IN THE SENATE OF THE UNITED STATES.

JANUARY 17, 1859.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HEIRS OF DR. JAMES THACHER *vs.* THE UNITED STATES.

1. The petition of the claimants and amendment.
2. Agreement of claimants' counsel and deputy solicitor to submit the case.
3. Claimants' brief.
4. Deputy solicitor's brief on the first hearing and on the reargument, and solicitor's brief on reargument.
5. Supplemental brief of claimants' counsel.
6. Opinion of the court refusing an order to take testimony, delivered by Judge Blackford.
7. Opinion of Judge Loring, concurring.
8. Opinion of Judge Scarburgh, dissenting.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said court at Washington, this 17th day of January, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, *Washington county.*

To the honorable the Judges of the United States Court of Claims:

The petition of the heirs at law of Dr. James Thacher, deceased, late of Plymouth, Massachusetts, would with respect represent unto your honors:

That the said James was appointed a surgeon's mate in the army of the revolution as early as July, 1775, and was stationed at the hospital in Cambridge. In March following (1776) he was appointed surgeon's mate to the regiment commanded by Col. Asa Whitcomb, and in November, 1778, he was appointed *full surgeon* of the first Virginia State regiment, commanded by Col. George Gibson. In 1779, he accepted the office of surgeon to the Massachusetts regiment commanded by Col. Henry Jackson, and retired from service on the 1st of January, 1783; making a period of seven years and six months service, four years of which he was *full surgeon.*

On the 21st day of October, 1780, Congress *resolved,* "That the officers who continue in service to the end of the war shall also be entitled to half-pay during life, to commence from the time of their reduction."

On the 15th May, 1828, Congress passed the following act:

Act of May 15, 1828.

AN ACT for the relief of certain surviving officers and soldiers of the army of the revolution.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That each of the *surviving* officers of the army of the revolution in the continental line, who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, to begin on the 3d March, 1826, and to continue during his natural life: *Provided,* That under this act *no officer shall be entitled to receive a larger sum than the full pay of a captain in said line.*

Your petitioners would represent that under the provisions of this act the name of the said James was inscribed on the pension rolls of the United States at the rate of $480 per annum. In the year 1832, (June 7th,) the following act was passed by the Congress of the United States, to wit:

Act of June 7, 1832.

AN ACT supplementary to the act for the relief of certain surviving officers and soldiers of the revolution.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That each of the *surviving* officers, non-commissioned officers, musicians, and Indian spies, who shall have served in the continental line, State troops, volunteers, or militia, at one or more terms, a period *of two years,* during the war of the revolution, and who are not entitled to any benefit under the act for the relief of certain surviving officers and soldiers of the revolution, passed 15th of May, 1828, be authorized to receive out of any money in the Treasury not otherwise appropriated, the amout of his full pay in said line, according to his rank, but *not exceeding in any case the pay of a captain in said line;* such pay to commence from the 4th day of March, 1831, and shall continue during his natural life.

SEC. 2. (Parties must relinquish all claims under the act of 1828, or any previous acts, before claiming under this.)

Under the provisions of this act, the said James relinquished all future benefits under the act of 1828, and availed himself of the privileges of the act of 1832, according to its provisions; and his name was again placed on the pension roll of the United States, at the rate of $600 per annum, from the 4th of March, 1831, and so continued to the date of his death in the year 1843.

Petitioners allege that under the act of May 15, 1828, the said James Thacher was legally entitled to $600 per annum, that being the amount of the pay of a *captain in the line*, in the artillery, or cavalry, and being less than the pay of a surgeon; and being so entitled, he often demanded pay thereof, but was refused by the Executive Department of the government charged with the paying of pensions.

Your honorable Court will perceive that, under the act of June 7, 1832, the said James was allowed his demand of $600 per annum, the pay of a captain in the line as aforesaid, and yet the same has been and is still withheld, under the act of 1828, which is identical with that of 1832 in its phraseology in fixing the *amount* of pension.

Petitioners allege that surgeons in the revolution were entitled to receive and did receive sixty and seventy-five dollars per month; and, as under the act of 1828, they could not receive "a larger sum than the full pay of a captain in the line," petitioners claim that the government is justly due them the difference between $480 and $600 per annum, from 3d March, 1826, to 4th March, 1831, five years, making $600.

Petitioners would further represent that they applied to the Hon. L. P. Waldo, then Commissioner of Pensions, on January 17, 1854, for the aforesaid increase of pensions, and in reply to said application then, their agent received the following reply:

PENSION OFFICE, *January* 23, 1854.

SIR: Your letter of the 17th, asking in behalf of the surviving children of Doctor James Thacher, that the pension allowed to him under the act of May 15, 1828, at $480 a year should be increased to $600 a year is received and filed.

You rest this claim upon the ground that the class of pensions to which this belongs was allowed by the Hon. J. M. Porter, Secretary of War, under the act of June 7, 1832, at $600 a year, and you claim that the phraseology of the two acts, so far as the amount of the pension is concerned, is the same.

It is true the terms of the two acts in this respect are similar, and yet Mr. Secretary Porter, after the decision to which you allude, held on the 17th day of February, 1844, that this class of cases under the act of May 15, 1828, *could not be increased to* $600. Under these two rulings of the Secretary, it has been the uniform practice of this office to allow surgeons under the act of May 15, 1828, but $480 a year, and to allow the same persons under the act of June 7, 1832, $600 a year, if their service in the revolutionary army had been two years. *t* is not my duty to point out the reason for the distinction under the

two acts, and can only say, "*I so find the law written.*" I am, therefore, under the necessity of rejecting the claim for an increase of Doctor James Thacher's pension, under the act of May 15, 1828.

L. P. WALDO,
Commissioner of Pensions.

ALEXANDER RAY, Esq.,
Present.

This letter virtually admits the justice and validity of petitioner's claim, but again rejects it on the ground solely that such had been the previous ruling of the Pension Office, and of the Secretary of War in 1844.

Petitioners therefore pray your honorable Court, after a proper consideration in the premises to prepare and report a bill to Congress for their relief, appropriating to them the sum of six hundred dollars in payment of the balance of pension due under the law, and as in duty bound your petitioners will ever pray, &c.

Attorney for Claimants.

JAMES THACHER'S HEIRS *vs.* THE UNITED STATES.

The petitioners in this case, Betsey H. Hodge, of Plymouth, Massachusetts, and Susan T. Bartlett, of Cambridge, Massachusetts, now come by J. J. Coombs, their attorney, and beg leave of the court to amend their petition, and state that they are the children and only heirs at law of said James Thacher, deceased, and the sole owners of this claim.

IN THE COURT OF CLAIMS.—NO. 523.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.

It is agreed that this case shall be submitted upon the statement made in the petition by the claimant, and such argument as the solicitor may make orally or in writing.

A. H. EVANS,
Attorney for Claimant.
JOHN D. McPHERSON,
Deputy Solicitor.

UNITED STATES COURT OF CLAIMS.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.

Petitioners' brief.

The first section of the act of May 15, 1828, under which this claim arises, provides "That each of the surviving officers of the army of the revolution, in the continental line, who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, to begin on the 3d of March, 1826, and continue during his natural life; *Provided*, That under this act, no officer shall be entitled to receive *a larger sum than a captain in said line.*"

The continental line, in the revolutionary war, consisted of infantry, cavalry, and artillery. The pay of a captain of infantry was $480 per annum; but the pay of a captain of cavalry or artillery was $600 per annum. The pay of a surgeon in said line was more than $600 per annum. The question is, whether the true construction of said act of May 15, 1828, limits the pay of a surgeon, under said act, to the *lowest* or the *highest* pay of a captain in the line. It is clear that said act of 1828 gives to a surgeon the full pay of a surgeon in the line, except so far as that pay is limited by the *proviso*. And this brings me to the question, what is the effect of a proviso upon the enacting clause of a statute? We claim the rule of law to be, that where any right is granted or conferred, in general terms, by the enacting clause of a statute, and afterwards limited by a proviso, the proviso should be *strictly construed*, so as to limit the operation of the enacting clause no further than a *strict construction* of the language of the proviso necessarily requires. This is the rule laid down by the Supreme Court in the case of the United States *vs.* Dickson, (15 Pet., 165.) The court say, that this is a "general rule of law which has always prevailed, and become consecrated almost as a maxim in the construction of statutes."

Apply the rule to this case. By the enacting clause of the act of 1828, Dr. Thacher is given the full pay of a surgeon (more than $600,) but then comes in the proviso, and limits his pay to the *full pay of a captain*. The terms of the proviso apply just as well to a captain of cavalry or artillery as to a captain of infantry. The amount of his pay, therefore, under the act of 1828, depends entirely upon the question, whether the proviso is to be construed *liberally*, so as to limit the operation of the enacting clause *most*, or *strictly*, so as to limit its operation *least*. The law says, it is to be construed *strictly*.

The point decided in the case of Wetmore *vs.* the United States, (10 Pet., 647,) is not similar to the point involved in this case. The plaintiff in error in that case served as paymaster in the army, from the 24th of April, 1816, to the 31st of May, 1831. He claimed the pay and emoluments of a major of cavalry, but the court decided that he was only entitled to the pay and emoluments of a major of infantry.

The act fixing the rate of his pay was the 3d section of an act of April 24, 1816, which declared, that regimental and battalion paymasters shall receive the pay and emoluments of majors, without specifying whether of cavalry or infantry. But when said act of April 24, 1816, was passed, *cavalry did not form any part of the army*, and consequently no such rank as major of cavalry existed in the army. On this point, the court say: "When to ascertain what the pay and emoluments (of regimental paymasters) are, we have to resort to the 3d section of the act of 1816, and there find it to be those of a major, the law must mean a *regimental, and not a staff major*. Certainly it should not be tortured to mean one of the arms of defence, or kinds of regiment, of which there is none in the army. When the act of 1816 was passed, cavalry did not form a part of the army; consequently, no such rank as major of cavalry existed, by which the pay of paymasters could have been graduated.

"But if, at the passage of the act of 1816, there had been such a rank in the army as major of cavalry, the question would have been a different one from the question now before the court. If the act of 1828 had simply provided that, surgeons should receive the same pay as captains, there would, at least, have been ground to doubt whether a captain of infantry or cavalry was intended. But when the enacting clause declares that a surgeon shall be entitled to receive the *full pay of a surgeon*, (which is more than the pay of *any* captain,) and then the proviso comes in and limits that pay to the full pay of a captain, the rule which requires the proviso to be construed *strictly*, settles the matter in favor of the right of a surgeon to receive the *highest* pay of a captain. In other words, a surgeon is entitled to all the benefits of the enacting clause, which the proviso strictly construed, does not necessarily take away."

The act of June 7, 1832, the language of which, so far as it relates to this point, is precisely like that of the act of 1828, has uniformly been construed to give a surgeon the full pay of a captain of cavalry or artillery. Dr. Thacher was himself permitted to relinquish the benefits of the act of 1828, and to receive $600 per annum under the act of 1832 from the time of the commencement of pensions under the last named act. Yet, strange to say, he has been uniformly denied the same rate of pay during the five years in which the act of 1828 was in force, prior to the taking effect of the act of 1832. We have the singular anomaly, of the same words in two different statutes on the same subject, being construed by the same public officers to mean very different things.

But this is not all. If the proviso to the first section of the act of 1828 limits the pay of a surgeon to the pay of a captain of infantry, it surely limits the pay of every other officer in the same manner. It is well said by the solicitor in his brief that "the proviso purports to fix one certain sum beyond which no pension can go, and it is difficult to perceive how this maximum can be construed to vary in different cases." Yet, under said act of 1828, colonels, majors, &c., and captains of artillery and cavalry have always been allowed $600 per annum. In fact, I believe every officer whose pay equalled or exceeded the pay of a captain of cavalry or artillery has been allowed

the maximum of $600, with the exception of surgeons. It strikes me as a patent absurdity to say that the proviso limits the pay of a surgeon to that of a captain of infantry, while it permits captains of cavalry and artillery and majors and colonels to receive the full pay of a captain of cavalry. Yet such has been the construction.

J. J. COOMBS,
Attorney for Petitioners.

N. B. Since the petition was filed in this case a question has arisen as to the right of children or other representatives to receive the back pension to which the parent may have been entitled (although the same was not *allowed*) in his or her lifetime. On the 19th September last the Attorney General gave an opinion adverse to the rights of children or other representatives to recover in such cases. As my brief on that question, I beg leave to present a printed pamphlet reviewing said opinion of the Attorney General, with a copy of said opinion appended.

J. J. C.

A review of the opinion of the Attorney General.

The Supreme Court of the United States, at its last term, in a case coming before it by writ of error from the supreme court of Tennessee, decided that children and grandchildren are jointly entitled to share the back (revolutionary) pension to which the parent had died entitled, although never establishing a claim to it while living. As it had been the prevailing practice of the Pension Office for several years past, to allow such claims to children only, in exclusion of grandchildren, this decision induced the Secretary of the Interior to refer the whole question as to the legal rights of the parties in such cases to the Attorney General for his opinion thereon. That officer has recently given his opinion, to the effect that, when a person so entitled to a pension dies before the allowance of the claim, the right *lapses* to the government, and that neither *children* nor *grandchildren* are entitled to anything. His reasoning goes to the extent also of excluding widows from recovering the pensions to which their husbands may have died entitled; and such has been the practical effect given to the opinion. So that now, under the practical operation which has been given to this opinion, all claims to revolutionary pensions die with the claimant, if not established in his or her lifetime. Said opinion is reviewed in the following pages:

The series of revolutionary pension acts now in force commenced with the act of May 15, 1828, and embraces the supplemental act of June 7, 1832, and the various widows' acts of March 4, 1836, July 7, 1838, July 29, 1848, &c. The acts embraced in this series differ from all prior pension laws (except some relating to navy pensions, which will hereafter be noticed,) in one essential par-

ticular, viz: Each one of these acts provides that the pension granted by it shall commence on a certain specified day, anterior to its passage, and vests in the beneficiary an *absolute* and *unconditional right* to the pension from that day, independent of the performance of any *subsequent act* by such beneficiary, or of any possible *future contingency*. It is under the acts embraced in this series only (with the exception of the navy pension acts above referred to,) that the practice has hitherto prevailed of allowing children (or other heirs or representatives) to receive, after the death of the party primarily entitled, the amount of pension which had accrued up to the time of his or her death, although never allowed by the department in the lifetime of the decedent.

As it is admitted by the Attorney General that the rights of children (or other heirs) stand upon precisely the same footing, under all the several acts belonging to this series, I shall, in my subsequent remarks, for the sake of perspicuity, refer specially to the provisions of the act of May 15, 1828, that being the first of the series, and the act under which the practice (so far as it relates to revolutionary pensions) originated. All I shall say of the provisions of that act, however, will apply with equal force to the subsequent acts of the series, so far as the question under consideration is concerned.

Said act of May 15, 1828, provides that "each of the surviving officers of the army of the revolution, in the continental line, who was entitled to half-pay by the resolve of October 21, 1780," and that "every surviving non-commissioned officer, musician, or private, who enlisted in said army for and during the war, and continued therein until its termination," &c., shall "be authorized to receive, out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, *to begin on the 3d of March*, 1826, and to continue during his natural life."

It will be seen that this act vested in the beneficiary, immediately upon its passage, an *absolute* and *unconditional* right to the pay (or pension) from said 3d of March, 1826. All the *conditions* requisite to entitle him to said pay were *past* and *perfected* acts. No person not entitled to the benefits of said act immediately upon its passage, could, by any *subsequent act* or *contingency*, become entitled. True, before a party could enjoy the benefits of said act, he would have to make proof that he was a person embraced by the provision of the act; but this proof had nothing to do in conferring the *right*. He simply had to *identify* himself as one of the persons upon whom the right was conferred by the act. So if A should die seised of an estate in fee simple, the *right* and *title* to such estate would immediately vest in his heirs. But if B should come forward to claim the estate as the heir of A, he would be compelled to *prove* the fact that he was such heir, before he could be permitted to enjoy the estate. This proof of his heirship, however, would have nothing to do in conferring the *right* upon him. The right existed in the same perfection before he made proof of his heirship as afterwards. The act of May 15, 1828, having vested in the beneficiary an unconditional right to the pay from the 3d of March, 1826, it follows, as a matter of course, that the *accruing* pay, from said 3d of March, 1826, to any given pay day subsequent to the date of the act, was just as much a sum *due* the claimant *before* he had

made his proof and got his name inscribed on the pension roll as *afterwards.*

Said act, however, contained no *express* provision for paying the amount which had thus *accrued* and become *due* to a beneficiary in his lifetime, to his heirs or representatives in case of his death, before getting his name inscribed on the pension roll.

But there had long been in force certain navy pension laws, granting pensions for a term of years to widows whose husbands had died of wounds received in the naval service. These acts, like the act of May 15, 1828, granted *absolute and unconditional* pensions from the happening of a certain contingency, viz: the death of the husband as aforesaid; and for a long series of years they had been uniformly construed to confer *vested rights*, descendible to heirs and representatives. This construction had been expressly sanctioned by Mr. Attorney General Wirt, in an able opinion, dated June 9, 1825, (Opinion of Attorneys General, vol. 2, p. 1,) in which he says:

"Here is a right which the law says shall accrue to the widow on the happening of a certain event—that of her husband having died by reason of wounds," &c. * * * "The law does not require either that application should be made by her, or that anything else should be done, in order to *consummate her right.* It is consummated by the mere fact of the death of her husband under the circumstances already mentioned. It is a *vested right* to so much money per annum, for five years," &c. * * * "But I understand that, if a widow whose rights commenced under the act of 1814, now, for the first time makes an application for her pension under all the past acts, no difficulty arises as to her now receiving all that those acts give her, provided that she still remains the widow of the deceased. I understand, also, that even where she has since intermarried before she has made any application, *or has died before she has made any application*, the uniform practice of the department has been, not to consider the application too late for all that was due at the time of her marriage or *death.*" * * * "It is a liberal exposition of these acts, in advancement of the public policy on which they are founded, *and I see no sufficient cause to disturb it by recommending a change.*"

The execution of the act of May 15, 1828, was committed to the Secretary of the Treasury. That officer finding that the navy pension laws above referred to, framed upon the same principle, had been uniformly construed, for a long course of years, to confer *vested rights*, which did not *lapse* in case of death without asserting a claim, and finding this construction expressly sanctioned by the opinion of Attorney General Wirt, applied the same construction to said act of 1828, and decided immediately after its enactment, that it in like manner conferred vested rights, descendible to heirs and representatives. But whether that decision was right or wrong, I do not conceive to be now a very material question, inasmuch as Congress very shortly afterwards passed a law which (as it was then understood and construed) made express and positive provision on the subject. On the 2d of March, 1829, an act was passed in these words:

"That whenever any revolutionary pensioner shall die, the Secretary of War shall cause to be paid the arrears of pension due to the

said pensioner at the time of his death; and all payments under this act shall be made to the widow of the deceased pensioner, or to her attorney, or if he left no widow, or she be dead, to the children of the pensioner, or to their guardian, or his attorney; and if no child or children, then to the legal representatives of the deceased."

It was doubtless the understanding of Congress, at the time of passing this law, that the act of 15th May, 1828, conferred, as it had been construed to, *vested* and *descendible* rights. Its object was not to *create* the right of succession, (which was supposed to exist already,) but to *modify* that right—taking it out of the course prescribed by the common law, or the statute laws of the States, by giving the widow a preference over children, children over creditors, &c.

The word "pensioner," in this last-mentioned act, was construed to embrace the case of a man *entitled* to a pension under the act of 1828, but whose name had never been inscribed on the pension roll, as well as the case of one who was actually in receipt of a pension at the time of his death; and this construction has uninterruptedly prevailed from the passage of the act down to the present year. If this construction be tenable, it makes but little difference, in the present controversy, whether the right of succession existed before the passage of this act, and was only modified by it, or whether it originated in this act. In either aspect of the case the right now exists, and has existed at least since the passage of the last mentioned act.

On the 19th of June, 1840, Congress passed another act on this subject, as follows:

"SECTION 1. *Be it enacted, &c.*, That in case any male pensioner shall die, leaving children, but no widow, the amount of pension due to such pensioner at the time of his death shall be paid to the executor or administrator on the estate of such pensioner, for the sole and exclusive benefit of the children, to be by him distributed among them in equal shares; and the same shall not be considered as a part of the assets of said estate, nor liable to be applied to the paymentof the debts of said estate, in any case whatever.

"SECTION 2. That in case any pensioner, who is a widow, shall die leaving children, the amount of pension due at the time of her death shall be paid to the executor or administrator, for the benefit of her children, as directed in the foregoing section.

"SECTION 3. That in the case of the death of any pensioner, whether male or female, leaving children, the amount of pension may be paid to any one or each of them, as they may prefer, without the intervention of an administrator."

It will be perceived that this is a mere re-enactment of the law of March 2, 1829, with some modifications. The principal modifications are: 1. To make the provisions of the said act of 1829 expressly applicable to the case of "any pensioner who is a widow," &c. 2. It entirely omits the clause of the act of 1829 which directed payment to be made to the legal representatives, in case there be no child or children living.

It will be observed, however, that it makes no change whatever, so far as the rights of widows and *children* are concerned, but leaves

them exactly as they stood under the act of 1829. A question arose, however, whether this act of 1840 did not, by implication, repeal that clause of the act of 1829 which directed payment to be made to the legal representatives, in case no child or children survived. And in 1845, Mr. Marcy, then Secretary of War, decided that it did repeal that clause of said act. In other words, he decided that the descent of the pension due at the decease of a person entitled, was limited to widows and *children*, and did not extend to *grandchildren* or collateral heirs.

Now, it is clear, that if the word "pensioner," as it occurs in said acts of 1829 and 1840, can be legitimately construed to apply to a man who is *entitled* to a pension under said act of 1828, although his name has never been inscribed on the pension roll, that must be the end of the controversy. And why may it not be so construed? As I have already shown, the law vests in him an *absolute* and *unconditional right* to the pension, from a specific day. In the language of Mr. Wirt, "The law does not require either that an application should be made by him, or that anything else should be done, in order to *consummate his right.*" "It is a *vested right* to so much money per annum," from the 3d of March, 1826. The pension, from said day, has actually *accrued*, and become *due* to him, and it is *continually accruing*. Is it doing any great violence to language, to call a man a *pensioner*, who is invested by law with all the *rights* of a pensioner, and to whom a pension is daily *accruing*, although no *payment* has actually been made to him on account of his pension? May he not be called a pensioner, in the same sense that a man who is invested by law with the right to vote, may be called a "*voter*," although he has never exercised the right of suffrage? The Attorney General says the word "pensioner" "certainly does not include any but those who actually enjoy the bounty of the government in the shape of periodical payments." I admit that, if we consult the *dictionary* merely, we may not find a more comprehensive definition of the word given. But every lawyer knows that the dictionary is often a very unsafe guide in the construction of statutes. The same word may have an enlarged or limited signification, according to the connexion in which it is used, or the subject matter to which it relates; and no lexicographer can be expected to state every possible sense in which every word may be legitimately used. Webster defines the word "PENSIONER" thus: "1. One to whom an annual sum of money is paid by government, in consideration of past services. 2. One who receives an annual allowance for services. 3. A dependent."

Now, I admit that this definition may suggest the idea that an actual *payment* is necessary to constitute a man a "pensioner." But if we look at the definition, given by the same author, of the verb "*to pension*," and of the present participle, "*pensioning*," a directly contrary idea is suggested. He defines the verb thus: "PENSION, *v. t.* To *grant* a pension to; to *grant* an annual allowance from the public treasury to a person for past services, or on account of disability incurred in the public service, or of old age." According to this definition, *to pension* a man is to *grant* him an annual allowance, &c. And, surely, *to pension* a man, is to make him a *pensioner*. Again:

He defines the present participle thus: "PENSIONING, *ppr.* Granting an annual allowance for past services." The act of *pensioning* a man, therefore, consists in *granting* (not in paying) an annual allowance. And does not the act of *pensioning* a man make him a *pensioner?* The irresistible inference from both of the foregoing definitions is, that the simple act of *granting* a pension makes the grantee a *pensioner.* And who *grants* the pension, under our laws? Unquestionably, *Congress* makes the *grant*, in and by the *law.* The executive department only ascertains, by the evidence, *who are the grantees.* Neither the Commissioner who issues the certificate, nor the ministerial officer who pays the money, has anything to do with *granting* the pension.

Again: In the series of acts now under consideration, the word "annuity" is used as exactly equivalent to the word "pension." In the act of 1828, neither word occurs, the allowance being simply called "pay." But in the succeeding acts, the allowance is uniformly called "annuity or pension." Although every *annuitant* is not necessarily a *pensioner*, yet every pensioner who receives a stated sum per annum is unquestionably an annuitant. As applied to a beneficiary under these pension laws, the words are *exact synonyms.* And Webster defines the word ANNUITANT thus: "One who receives, *or is entitled to receive* an annuity." Now, if one who is *entitled to receive* an annuity is an "annuitant," is not one who is *entitled to receive* a pension, in the same sense, a "pensioner?"

So much for the argument drawn from the dictionary.

If it be insisted that an actual *payment* is necessary to constitute a man a pensioner, the argument proves too much; for it is admitted, that if the claim has been *allowed*, and the pension certificate has been *issued* in the lifetime of the claimant, and he has died before the payment of the money, the children are entitled to all that was due at his decease. But the man to whom a certificate has issued, but to whom no *payment* has been made, comes no more within the definition given of the word "pensioner," than the man who has not yet completed his proof.

And this leads me to the consideration of one of the strongest reasons in favor of the construction which has hitherto prevailed. It is a rule of construction, that the legislature will be presumed to have intended that a general and beneficial law shall operate *equally* upon all persons standing alike in point of *merit*, in relation to the subject-matter; and such a construction will be given as will effectuate this intention, if it can be done without actual violence to the language. In other words, the legislature will not be presumed to have intended to make a mere whimsical distinction, a "distinction without a difference," between persons whose claims stand upon equally *meritorious* grounds; and words will not be so interpreted as to produce that result, if any other interpretation be admissible.

Keeping this principle in view, let us look at the effect which will be produced by construing the word "pensioner," in the acts of 1829 and 1840, to embrace only persons to whom pension certificates have actually been issued.

A presents his claim, which is allowed; the certificate issues, and the next day he dies, without drawing his money. His children

receive the amount due at his decease. B presents his claim, but dies the day *before* the certificate would have issued; and his children receive nothing. Now, every one must see that the children of A and B stand upon an equal footing in point of merit, and that the distinction which allows the claim of the former, and cuts off that of the latter, has no shadow of *reason* or *justice* to stand upon. Under the construction which has hitherto prevailed, however, no such unreasonable and unequal results could happen.

The Attorney General says, in substance, that there is no more propriety in calling a man a pensioner who is merely entitled to a pension, than there would be in calling a man a soldier, merely because he might have enlisted in the army if he had thought proper to do so. There is not the slightest analogy between the two cases, and therefore the illustration is not apposite. The pension laws now under consideration, as I have already shown, vest in the beneficiary an absolute and unconditional right to the pension; and no act is required of him to perfect that right. He is by law invested with all the *rights* and *qualities* of a pensioner; and pension money has actually accrued and is accruing to him, which will be paid over whenever he identifies himself as the person in whom the right is so vested by law. But before a citizen can become a soldier, he must perform a *condition precedent*—namely, enlist. Until he does enlist, he is invested by law with *none* of the *rights* or *qualities* of a soldier. If the pension laws now under consideration were like the act of March 18, 1818, or the various invalid pension acts, the former of which requires the claimant to make a declaration, and the latter to complete his proof, before any right shall vest in him, the illustration given by the Attorney General would be more pertinent.

The Attorney General, in reference to the act of 2d March 1829, says:

"There is one consideration which sets aside all pretence of claim under this law, in a case like the present. It provides only for the payment of *arrears*. This word has a signification as definite and well known as any other in the language. It means a balance—one portion left behind another portion—a sum still remaining unpaid after payment of a part."

This definition *may be* critically correct, but it is not well settled by authorities. Webster, it is true, draws a distinction between ARREAR and ARREARS, thus: "A person may be in *arrear* for the whole amount of a debt, but *arrears* and *arrearage* imply that a part has been paid." It is believed, however, that Webster stands unsupported by any other authority in this definition; and it is difficult to discover any *reason* why the *singular* should have a more comprehensive signification than the *plural*. But I am not disposed to question the critical accuracy of Mr. Webster's definition, inasmuch as the reference to it suggests one of the very best arguments in favor of my view of the question.

It so happens that this vital word "ARREARS" *does not once occur* in the act of 19th June, 1840, the only act now in force under which anything is claimed. It occurs in the act of 1829, but that act was superseded by the act of 1840. Now, what is the legitimate inference

from this fact? It is a well-settled rule of construction, that where an old act is revised by a new one on the same subject, and the new act, in incorporating any provision of the old one, changes a material word, the change will be presumed to have been made with intent, either of altering the provision of the old law, or of *removing some doubt as to its true construction*. Now, apply this rule to the present case. The act of 1840 is a mere revision of the act of 1829. The act of 1829 used the word "arrears," but some doubt had been entertained as to its strict applicability to a case in which the *whole* pension was due and unpaid. The legitimate inference is, that Congress, in framing the act of 1840, substituted the words "amount of pension" in lieu of "arrears of pension," for the express purpose of removing this doubt.

Again: The argument drawn from Webster's definition of the word "arrears" proves too much; for it would cut off the claims of children in a case where the certificate had actually issued to the claimant in his lifetime, if no money had been paid upon it, as well as in a case which had never been allowed.

The Attorney General further says, in effect, that the acts of 1829 and 1840 cannot be construed to apply to the case of a person who was never actually *allowed*, though entitled to, a pension in his or her lifetime, because they provide for the payment of the amount "*due*" the pensioner, &c. And he assumes that nothing can be *due* until the name of the claimant is actually inscribed on the pension roll. I have already shown the error of this assumption. The pension which has accrued from the time specified in the act for its commencement to the last semi-annual pay day is just as much a sum *due* the beneficiary before his name has been placed on the pension roll as afterwards. You might just as well say that a note is not *due* till a *judgment* is rendered upon it, as to say there is nothing *due* a person entitled to the benefit of one of these pension laws till his claim is actually *allowed* by the department.

The Attorney General refers to the act of 4th July, 1836, to show that "Congress knew very well how to describe a revolutionary soldier who died without getting a pension." "In that act," he says, "they do not speak of him as a *pensioner*, nor call the claim of his widow or children a *pension due*."

Surely the Attorney General must have had a very obscure idea of the scope and effect of said act of 1836. It does not give, nor purport to give, to the widow or children *anything that the soldier ever had the slightest claim to in his lifetime*. The third section gives to a certain class of widows, whose husbands were *not* entitled under the act of 7th June, 1832, because they were *not living* when said act passed, the pensions that they *would have been* entitled to under said act, "*if living at the time it was passed*." The Attorney General, however, doubtless had particular reference to the *second* section of said act, although he has inadvertently cited it as the *fourth* section. But the second section does not, any more than the third, give or purport to give to the widow or children anything to which the soldier, in his lifetime, ever had *any right or claim*. The act of 7th June, 1832, gave to officers, soldiers, &c., "then surviving," pensions, to commence on the

4th of March, 1831. The second section of the act of 1836 gives to the widow or children of any soldier who had died *since the 4th of March*, 1831, and *before the date of said act of June* 7, 1832, the amount of pension which *would have accrued* from the fourth day of March, 1831, to the time of his death, and become payable to him by virtue of that act, "*if he had survived the passage thereof.*" It is as clear as a sunbeam that this act provides only for the widows and children of soldiers who never were entitled to any pensions in their lifetimes. But what is claimed under the acts of 1829 and 1840 is the pension to which the soldier *was* confessedly *entitled* in his lifetime, although he never got it. To show, therefore, that a soldier who never had any *right or claim* to a pension is not called a "pensioner" proves nothing and illustrates nothing. Nor does it prove or illustrate anything to show that the amount given to the widow or children by the second section of the act of 1836 is not called "pension due," for the very good reason that it is something which the soldier never had the *slightest claim to* in his lifetime.

Although a clear comprehension of the provisions of said act of 1836 utterly annihilates the argument which the Attorney General has sought to predicate upon it, yet the second section of said act is entitled to great consideration, as showing what Congress evidently *understood* to be the rights of widows and children whose husbands or fathers had died *entitled* to pensions under the act of 1832. For unless Congress had supposed that widows or children could recover the back pension to which a beneficiary under said act should die *entitled*, it is inconceivable that they should have thought of giving them this little fraction, from the 4th of March, 1831, to the death of the soldier, where he died between the said 4th of March, 1831, and the 7th of June, 1832, and, *on that account*, was *not entitled* under the last mentioned act. Congress never would have been guilty of the patent absurdity of giving to the widow or children the pension from the 4th of March, 1831, to the death of the husband or father, in a case where he was *not entitled* to it in his lifetime, and withholding it from them in a case where he *was entitled* to it.

I have thus far, in examining the question of the true construction of the acts of 1829 and 1840, treated it as if it were a new question, now for the first time arising under said acts. It will be seen that the whole question turns upon the point whether the word "pensioner," as used in said acts, can be legitimately construed to embrace the case of a person who was *entitled to*, but never actually *paid*, a pension, under any of the pension laws embraced in the series commencing with the act of May 15, 1828. I trust I have shown that the construction, even at its inception, was not altogether unreasonable. Nay, more; I think I have shown that, inasmuch as it was the only construction which could prevent said acts from operating with gross inequality upon persons standing in the same degree of merit with reference to the subject matter, it was, in fact, a construction eminently "fit to be made."

But I now come to consider the question as to the effect which ought to be given to a contemporaneous construction uninterruptedly pursued by the executive departments for more than twenty-eight years, and

impliedly sanctioned by Congress in instances almost innumerable. And here I must express my profound astonishment that the Attorney General should have entirely overlooked this controlling argument in the case. I must express my surprise, also, that that distinguished legal officer should have, with apparently so slight an investigation of the matter, arrived at the conclusion that all the officers of the government charged with the execution of these laws through so long a series of years, had been paying out millions of money without the slightest shadow of warrant in law for so doing. I can only account for it by supposing that the honorable Attorney General, in the midst of pressing business, has too precipitately adopted the views of some subordinate, on whose judgment and legal ability an undue estimate had been placed.

The fact that the construction now contended for has prevailed ever since the passage of the act of March 2, 1829, is too notorious to require any proof. In fact, the Attorney General admits that "the practice of allowing these claims has prevailed in the Pension Office for twenty-five years." And this practice has not been permitted to prevail in the Pension Office without attracting the scrutiny of the higher executive officers. It has not related to an obscure or unimportant subject. On the contrary, it is a practice under which claims have been almost *daily* allowed during the whole time it has prevailed, and millions of dollars have been paid out under it. It has time and again been subjected to the scrutiny of heads of departments and attorneys general, and been expressly sanctioned by them.

I have now before me a copy of the "Regulations" prescribed by General Cass, then Secretary of War, for carrying into effect the act of June 7, 1832, which is dated the 27th of the same month. One of these regulations is in these words:

"No payment can be made on account of the services of a person who may have died before the taking effect of the act of June 7, 1832; and in case of death subsequent thereto, *and before the declaration herein required is made*, the *parties interested* will transmit such evidence as they can procure, taken and authenticated before a court of record, showing the services of the *deceased*, the period of his *death*," &c.

This practice was expressly and emphatically sanctioned by Mr. Attorney General Butler, on the 12th of April, 1837, although the present Attorney General says (erroneously) that it was *denied* by him. The following question was submitted to him by the Secretary of War:

"Can the children of a widow, who was living on the 4th of July last (1836) and was entitled to the benefits of the third section of the act, now draw the amount due up to the date of her death, *although she failed to apply?*"

And this question Mr. Butler answered in the *affirmative*. He says:

"According to several opinions heretofore given in this office, especially in navy pension cases, the right of the widow under the act is to be regarded as a vested interest accruing on the passage of the law, *and not defeated by the omission to apply for it*," &c.—(Mayo & Moulton's Pension Laws, 410.)

On the 25th of May, 1840, Mr. Attorney General Gilpin decided,

in the case of Mary Updegraff, who died before the pension was allowed, that the amount accruing to the time of her death was payable to her children, expressly referring to the act of March 2, 1829, as applicable to and governing the case.—(Mayo & Moulton, 422.)

In 1839, Mr. Woodbury, then Secretary of the Treasury, expressed a doubt as to the legality of the practice, and suspended a requisition, in the case of Jesse Gove, until the matter could be inquired into. Upon being informed by Mr. Poinsett, Secretary of War, that the allowance was in accordance with "the *invariable practice* of this [the War] Department under my [his] predecessors and the united opinions of Mr. Attorney General Wirt and Mr. Attorney General Butler," Mr. Woodbury waived all objections and let the claim pass.—(Mayo & Moulton, 493.)

On the 5th of March, 1850, Mr. Ewing, Secretary of the Interior, in the case of Elizabeth Thom, decided that the pension which accrued, but was not allowed to the decedent in her lifetime, was a *vested right*, which descended to her personal representatives, although no children survived.—(Mayo & Moulton, 519.)

On the 5th of November, 1850, Mr. Stuart, Secretary of the Interior, in the case of Polly Knight, decided that a pension accruing under the act of 1836 was not forfeited by the failure of the widow to claim it in her lifetime, thereby overruling an *obiter dictum* to the contrary by Mr. Attorney General Crittenden. The case had been referred to Mr. Crittenden for his opinion on another question, but he had thrown out the suggestion that the claim of Mrs. Knight had been forfeited by her failure to assert it in her lifetime. On this point Mr. Stuart, after remarking that he does not deem that a question necessary to be considered in the case, says: "But, in view of the repeated decisions of that question in opposition thereto, [to Mr. Crittenden's suggestions,] and the long-continued and uniform course of practice under said decisions, I am constrained to dissent from that part of the Attorney General's opinion."

This question was again reviewed by Mr. Attorney General Cushing in 1856 in the case of the children of Jesse Lovering, (7th vol. Op. Attys. Gen., 717.) So far from having "denounced" the practice "as illegal," he *sustained* it by an able and conclusive argument. True, he thought the practice *originated* in a doubtful, or rather "forced" construction of the acts of Congress, but he nevertheless argues that, by long and uninterrupted usage, and by the acquiescence in and implied sanction of that usage by Congress, said construction has become established law. Accordingly he expressly advised the Secretary of the Interior to *continue* the practice.

The case of Jesse Lovering's heirs was as follows: Jesse Lovering was entitled to a pension under the act of 1832, but died in 1844, without having asserted his claim. He left children who, after his death, applied for the pension due at the time of his decease. The question as to their right to recover was referred to Mr. Attorney General Cushing by the Secretary of the Interior. Mr. Cushing, in his opinion, states the question submitted to him to be, "how far a pension not claimed, and of course neither certified nor adjudicated,

but which, it now seems, if claimed, would have been allowed, is to be considered as a *vested interest* of the party as property demandable by representative persons?"

After referring to a former opinion given by him as to the construction of certain *invalid* pension laws, in which he held that under said *invalid acts* no rights survived to the children, he says:

"My examination of the statutes led me to the belief that their construction ought *probably* to have been the same in regard to revolutionary pensions, *yet that it had not been;* but, on the contrary, the unsatisfied right of pension had been constantly held to be claimable by certain representative persons, though by rather forced construction of the acts of Congress. That such has from the beginning been the received construction of the law is proved by what occurred when it was called in question by the Secretary of the Treasury, (Mr. Woodbury,) so long ago as the year 1839, and the inception of the practice was explained by Commissioner Edwards. To the same conclusion is the declaration in 1850 of the Secretary of the Interior, (Mr. Stuart,) who, in disposing of Polly Knight's case, negatived an *obiter dictum* to the contrary at the close of Mr. Crittenden's opinion in that case.

"Finally, the same point is thoroughly established by the complete and comprehensive statements of the late commissioner, (Mr. Waldo,) in Wheeler's case, and of the present, (Mr. Minot,) in the case of Oo-la-yah-tah." He says that in the examination of the last mentioned case, he felt "constrained to yield, so far as regards the matter of revolutionary pensions, to the maxim *stare decisis*, and to concede that the allowance of unclaimed pensions of that character to certain representative persons, *is the established rule of the government*, and to content myself with advising that the rule, as thus fixed by long practice, shall be *acquiesced in*, but rigidly confined, meanwhile, within the narrowest possible limits. *I continue after further reflection of the same sentiment on both points.*"

Again, he says: "After a continuous series of uniform decisions on a point, in numerous cases, and for many years, under successive administrations of the subject matter, it seems to me hardly worth while to recur to doubts of mere statute construction, not involving any question of constitutionality, or of grave public or private wrong. Time and tide cannot pause long enough to admit of the re-examination and re-settlement of all these ordinary administration matters. Besides, it tends to grievous fluctuations in the Executive business."

As the claims of *grandchildren* to the arrears of unclaimed pensions were not thus supported by long and uniform practice, Mr Cushing advised against their allowance. But so far as the claims of *children* are concerned he could not have given a more decided opinion as to their validity. He takes the true ground, that however doubtful the construction which gave them this right may have been *originally*, it has, by repeated decisions, long practice, and legislative acquiescence, become the settled and established law of the land.

Yet Mr. Attorney General Black says that this practice was "denounced as illegal" by Mr. Cushing. Can it be possible that he ever read Mr. Cushing's opinion? Nothing could be more unfair

than Mr. Attorney General Black's reference to the opinions of Messrs. Woodbury, Butler, and Cushing. He says the practice of allowing these claims to children "was doubted, however, by Mr. Woodbury, *denied* by Mr. Butler, and *denounced as illegal* by Mr. Cushing;" thus arraying all these distinguished names against the legality of the practice.

The facts are, that although the legality of the practice was called in question by Mr. Woodbury, yet, after having been advised of the opinions of Attorneys General Wirt and Butler on the subject, and the long usage pursuant thereto, he *acquiesced* in the practice.

Mr. Butler, instead of *denying* the legality of the practice, *affirmed* it in the most positive manner, and without the expression of a *single doubt* on the subject.

Mr. Cushing, instead of "denouncing" the practice "as illegal," demonstrated its present legality by an able and unanswerable argument.

If we go back to the decisions under the navy pension laws, where the principle involved was the same as under the revolutionary acts now in question, the practice has continued, without interruption, for near *half a century*. It has been affirmed and sanctioned by Secretaries of the Navy Department, the Treasury Department, the War Department, and the Department of the Interior, and by at least four Attorneys General. And the only opinion of an Attorney General against it (prior to Mr. Black's) is the *obiter dictum* of Mr. Crittenden in Polly Knight's case, which was promptly overruled by the Secretary of the Interior.

But the sanction of this practice has not been confined to the Executive Departments alone. Congress has annually appropriated large sums of money for the payment of revolutionary pensions, with a full knowledge that large portions of the same were being applied to the payment of widows, children, &c., in cases where the party entitled had died without establishing a claim. Not only so, but it is believed that at every session Congress, has by special acts allowed more or less claims of this character, which had been disallowed by the department, on account of some informality or supposed insufficiency of the evidence. Congress could not be ignorant of the fact, that claims of this character were being daily allowed by the department; for it is notorious that a large proportion of these claims were prosecuted by the members themselves—not for any fee or reward, but for the accommodation of their constituents.

There is one view, however, in which the legislative exposition which has been given to the acts under consideration is, upon one of the plainest principles of law, entirely conclusive of their true legal construction.

It is a well known rule of construction, that when a subsequent act adopts the *same word* which had been used in the same connexion in a prior act on the same subject, and which word, under the prior act, had received a settled and well known *construction*, the legislature will be presumed, in adopting the *word*, to have adopted such *construction* also.

Now, apply this rule to the question under consideration. The act

of 1840 relates to the same subject matter as the act of 1829, and is, in fact, a mere revision of it. When the act of 1840 was passed, the act of 1829 had been in force *eleven years*, and during all that time the word "pensioner," as used in it, had been construed to apply to and embrace the case of a person fully *entitled* to a pension, though he had never *received* it. In the act of 1840, Congress adopts the *same word* in precisely the same connexion and in relation to the same subject-matter. Is it not a manifest absurdity to say that Congress did not intend that the same construction should be given to it which had so long, so uniformly, and so *notoriously* prevailed under the act of 1829? No lawyer will question the correctness of the *rule* as above laid down, and it does not require the aid of a legal vision to perceive its strict and controlling *applicability* to the case under consideration.

Again: Congress passed, successively, the acts of 15th May, 1828, 7th of June, 1832, 4th of July, 1836, 7th of July, 1838, 29th of July, 1848, &c., well knowing at the time of passing each successive act what practice had prevailed under the prior acts of the series in reference to the question now under consideration. Was not their failure to insert any provision expressly repudiating that practice, in each of these successive acts, equivalent to a direct recognition and sanction of such practice?

In one of these acts Congress has *expressly* sanctioned and adopted this practice. In the second section of the act of 29th July, 1848, it is expressly provided, "that the same rules of evidence, *regulations*, and *prescriptions*, shall apply and govern the Commissioner of Pensions and pension agents under this act *as now prevail* under existing pension laws which relate to widows of revolutionary officers and soldiers." I have already shown that among the *regulations* and *prescriptions* then prevailing was the rule for paying the back pension to children, where the widow died without establishing her claim.

Surely, if ever a question was definitely settled by contemporaneous construction and legislative exposition, it is the very question now under consideration. However questionable the construction given to these statutes may have been in the first instance, it is now upon one of the plainest principles of law, settled and established beyond the legitimate control of any power short of the legislative.

The rule of law applicable to such cases has been so often and so clearly laid down by the highest judicial tribunals, and is so familiar to every professional lawyer, that I must apologize to that class of readers for here referring to a few authorities in point.

In a case decided by the Supreme Court of the United States, the question was as follows: A law of Pennsylvania, of 1715, required deeds to be acknowledged or proved "*before one of the justices of the peace of the proper county.*" The deed in question had been acknowledged before a *supreme judge* of the State. Chief Justice Marshall, in delivering the opinion of the court, said: "Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. A judge of the Supreme Court would not be deemed a justice of the county, and the decision would be that the deed was not regularly proved, and therefore not legally recorded." But it having been shown that

the practice had long prevailed in Pennsylvania of acknowledging deeds before the Supreme judges, and had received the implied sanction of the judicial tribunals of that State, the court decided that the practice must prevail over the strict letter of the law.—(McKeen *vs.* Delancy, 5th Cranch, 22.)

In another case, the Supreme Court of the United States has said:

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."—(Edwards *vs.* Darby, 12 Wheat., 206.)

The supreme court of Massachusetts, in a case which turned upon the construction of a single word in a statute, and which construction they sustained upon the sole ground of long continued usage, says:

"Although, if it were now *res integra*, it might be very difficult to maintain such a construction, yet we cannot shake a principle which has so long and so extensively prevailed. If the practice originated in error, that error is now so common that it must have the force of law. The legal ground upon which this principle is now supported is that long and continued usage furnishes a contemporaneous construction which must prevail over the *mere technical import of words.*"—(Rogers *vs.* Goodwin, 2 Mass., 475.)

Again, the same court has said:

"A contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by a legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law, and after it has been acted on for a century, nothing but legislative power can effect a change."—(Packard *vs.* Richardson, 17 Mass , 144.)

"In construing ancient statutes, contemporaneous construction, as evidenced by usage, will not be departed from without the most cogent reasons; and if the construction be doubtful, usage will control."—(Chestnut *vs.* Shane, 16 Ohio Rep., 599.)

Strange as it may appear, that the Attorney General, in considering this question, should have ignored the effect of a contemporaneous construction sanctioned by a practice of so many years, it is still more strange that he should have totally disregarded a recent decision of the Supreme Court of the United States on the precise question submitted to his consideration.

The case of Walton *vs.* Cotton, (19 How., 355,) may be briefly stated as follows:

The administrator of a widow who had died entitled to a pension under the act of 1836, but which had not been allowed in her lifetime, had received the amount due at her death for the benefit of her children, pursuant to the then prevailing practice in the Pension Office. She had left, as her heirs-at-law, both *children* and *grandchildren*, and the latter had claimed a distributive share of the money from the administrator, and brought suit to recover it in a State court of Tennes-

see, where the parties resided. The supreme court of Tennessee having decided against the claim of the grandchildren, the case was brought before the Supreme Court of the United States by a writ of error, under the twenty-fifth section of the judiciary act of 24th September, 1789; and that court decided that the grandchildren were entitled, *per stirpes*, to share the money with the children.

The Attorney General assumes, however, that because "the money had already been paid by the government," the court did not consider or adjudicate the question, whether *either party* was entitled to the money, *as against the government*. He says: "both sides admitted it to have been rightly paid. There was no dispute except about the division. In such case, the court could not go behind the issue made by the parties themselves."

That the Attorney General has fallen into a most transparent error, in this view of the subject, must be manifest to every lawyer. The clause of the judiciary act which gave the Supreme Court of the United States *jurisdiction* of the case, is so much of the twenty-fifth section as provides "that a final judgment or decree in any suit in the highest court of law or equity in any State," &c., "where is drawn in question the construction" of any clause of any "*statute of the United States*, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said statute, may be examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error," &c.

Now, in the case of Walton *vs.* Cotton, the construction of the statutes of the United States relating to the payment of pensions had been "drawn in question," and the decision of the State court had been against the right set up by the grandchildren under said statutes. This, and this only, gave the Supreme Court of the United States *jurisdiction* to consider the case on the writ of error. To give a construction to said statutes of the United States, was the *only purpose* for which said court could legally or constitutionally take jurisdiction. Although "the money had already been paid by the government," and the question was only one as to its distribution, yet *unless that distribution could be made under and by virtue of the statutes of the United States*, it is very clear that the Supreme Court of the United States had no jurisdiction to make it at all. A *State court* might distribute a fund in the hands of an administrator, in accordance with the statutory laws of the State, or upon common law principles, without taking into consideration what right the administrator had to collect it. But the Supreme Court of the United States could have jurisdiction of this fund for no other purpose but to *declare the rights of the parties under and by virtue of the statutes of the United States*.

But the Attorney General thinks that, because the question of jurisdiction was not raised by "the issue made by the parties themselves," the court could not "go behind" that issue and consider it. It is sufficient to confront this assumption with what the Supreme Court itself has repeatedly said on this very point. Scarcely any proposition has been more frequently decided by said court, than that it will not entertain jurisdiction of a case coming before it from a State court, on writ of error, if it appears, on an examination of the case,

that their jurisdiction is not clear; even although the parties have not only omitted to "make the issue," but where they have *expressly waived* the question of jurisdiction.

In a case which came before said court by writ of error, from the supreme court of Illinois, Chief Justice Taney, in delivering the opinion of the court, said:

"It is true that the plaintiffs and defendants have both waived all objections to the jurisdiction, and have pressed the court for a decision on the principal points. But *consent will not give jurisdiction.* And we have heretofore, on several occasions, said, that when the act of Congress has so carefully and cautiously restricted the jurisdiction conferred on this court, over judgments and decrees of the State tribunals, it would ill become the court to exercise it in a different spirit."—(Mills *vs.* Brown, 16 Pet., 525.)

The Attorney General pays but a poor compliment to the Judges of the Supreme Court, by assuming that it never entered their minds, in the case of Walton *vs.* Cotton, that they could take jurisdiction of the case for no other purpose but that of giving a construction to the acts of Congress out of which the rights of the parties sprung.

But it is a waste of time to argue further, that the court was in *duty bound* to give a construction to the acts of Congress in question; for it appears, from the report of the case, that the court *actually did* refer to and comment upon said acts, and *expressly* base its decision upon a construction of their provisions.

J. J. COOMBS.

NOTE.—It will be perceived, (incidentally,) by reading the foregoing pages, that the practice has not been uniform, as to paying back pensions to any other class of heirs or representatives, except *widows* and *children.* Until Mr. Marcy decided to the contrary, in 1845, the practice had been uniform of paying to the executor or administrator (for the benefit of grandchildren or collateral heirs) in case no widow or child survived. Since then, however, a contrary practice has prevailed, except for a short time in 1850–'51, when, under a decision of Mr. Ewing, the old practice was reinstated. During *all the time*, however, the practice has uniformly prevailed of paying to the *widow*, if any, and if no widow, to the *children.* I have intentionally avoided discussing the question as to the rights of grandchildren or personal representatives, where no widow or child has survived, as my object was simply to review the opinion of the Attorney General, which cuts off *all* claims—as well those of widows and children, as grandchildren and personal representatives.

NOTE SECOND.—It is worthy of remark, that while the argument of the Attorney General is based almost exclusively on the technical objections, that the word "*pensioner*" cannot be construed to apply to a person who was never in receipt of a pension, and that the word "*arrears*" cannot be construed to apply to a sum of money which remains *wholly* unpaid, yet in the case before him and in which the opinion is given, according to his own statement of it, neither of these technical objections existed. It was a case of *increase*

of pension. The decedent had been in receipt of a pension (though not a full pension) in her lifetime. She was therefore a "*pensioner*," according to the strict definition of the word, as given by the Attorney General. She had also, in her lifetime, received a *part* of the pension to which she was entitled. What remained behind, therefore, was "*arrears*," according to his own definition of that word. Not deeming, however, that there is any well-founded reason in law for making a distinction between a case of increase and a case never allowed at all, I have not noticed this point in the body of the foregoing review.

OPINION OF THE ATTORNEY GENERAL.

ATTORNEY GENERAL'S OFFICE,
September 19, 1857.

SIR: I have received your letter on the application made by the grandchildren of Deborah Grant for the pension to which they allege she was entitled, and have examined the papers by which it was accompanied.

Mrs. Grant first began to receive a pension in 1839; it was increased in 1841; and in 1853 she applied for a still further increase, alleging that the services performed by her husband entitled her to a larger pension than either of the previous decisions of the office had given her. Pending this last application, she died, leaving grandchildren, but no children, living. The grandchildren now renew the application.

As to the increase applied for in 1853, but never allowed, that must be regarded as an unestablished claim to a pension. The mere application made in her lifetime does not make the right of her children any better than it would have been if she had never applied at all.

I take it for granted that her grandchildren have proofs sufficient to show that she in her lifetime was entitled to receive what they now claim as her representatives. Nor will I stop to discuss the question whether the grandchildren of a pensioner have or have not the same rights that children have. It is settled by the Supreme Court (19 Howard, 355) that they stand on equal ground. What has been decided by that tribunal is not, and ought not to be, open to further dispute.

It is also very clear, that pensions due to widows will descend to ther children or grandchildren, just in the same way that pensions coming to revolutionary soldiers themselves will descend to theirs.

These principles being thus settled, the case before me, and the question arising on it, may be put thus: A soldier of the revolution, who might have got himself placed on the pension roll, and received from the government a pension during his natural life, has died without doing so. Can his children, after his death, get all that he might have got in his lifetime, on the production of the same proofs?

Before this question can be answered in the affirmative, the right of

the children must be shown by some act of Congress which gives it to them either expressly or by very clear implication. The non-existence of a law to forbid it proves nothing. Every claim upon the public money must be made out affirmatively by the claimant. The burden of proving that such a demand is *not* well founded never lies upon the Government. No man can be allowed to take from the Treasury what Congress has not given; and Congress gives nothing, except when the intention to do so is expressed in plain and unambiguous words.

It is utterly in vain to argue that the annuity which the law authorizes a soldier to receive is property in which he has a vested right, and descendible like money secured to him by a bond. It is not so. If it were, Congress would have no power to say whom it should go to after the death of the pensioner, for Congress cannot regulate the descent or distribution of property in the States. It would necessarily pass by the law of succession which prevails at the place of the pensioner's domicil. But it is a mere gratuity which the Government may and does bestow on whom it pleases. If it be not extended beyond the immediate object of the bounty, his representatives can have no interest in it. If it be so extended, the representatives take it as a favor, and not of right. It is for this reason alone that Congress without regard to the law of the States, has always exercised the power of saying to whom the arrearages of a pension shall be paid when the pensioner dies. It is given to a widow in exclusion of children, and in other cases to children in exclusion of collateral kindred and creditors. This right of bestowing it on some classes of relatives, while others, equally entitled in justice and preferred by the general rules of law, are forbidden to enjoy it, springs entirely out of the right to withhold it from all of them. It follows, that if the children of a revolutionary soldier can get the pension due to their ancestor, they must get it in pursuance of some positive law to that effect. Nothing remains, therefore, but to see whether Congress has made any provision which authorizes the children of a deceased soldier to prove the services of their parent, and get the pension which might have been awarded to him.

The second and third sections of the act of 1836 (5 U. S. L., 128) were manifestly and plainly intended to give certain representatives of deceased soldiers the privilege of establishing claims never established by the soldiers themselves. But the second section does not cover this case, because it refers only to those soldiers who died between the 4th of March, 1831, and the 7th of June, 1832. The third section is equally inapplicable; for it was intended solely to substitute the widow of a soldier as a pensioner in his place, upon proof by her of his services. Children are not spoken of.

The act of 1832 (4 U. S. L., 530,) in the fourth section, provides for the case of a pensioner dying between the semi-annual pay days, and directs that the proportionate amount accruing between the last pay day and the time of his death shall be paid to his widow, or, if he left no widow, to his children. This refers so clearly to a pensioner actually put on the roll in his lifetime, that nobody pretends to claim anything under it for the children of a soldier who died without being a pensioner. If there were no other law on the subject, I should have

my doubts whether the children of a pensioner could recover for what accrued further back than from the last pay day before his death, though one or several full payments might be due.

But the act of 1829, section 1, (4 U. S. L., 350,) declares, that "whenever *any* revolutionary pensioner shall die, the *arrears* of pension *due* to the said pensioner at the time of his death" shall be paid to his widow, or if he left no widow, to his children. There is one consideration which sets aside all pretence of claim under this law in a case like the present. It provides only for the payment of *arrears*. This word has a signification as definite and well known as any other in the language. It means a balance—one portion left behind another portion—a sum still remaining unpaid after payment of a part. Unless a pensioner received a part of his pension during his life, (and he could not do that without being on the pension roll,) there can be no such thing as *arrears* at his death. There are other reasons equally potent in favor of the same construction, but they will be embraced in what I have to say about the act of 1840.

That act (5 U. S. L., 385) provides for the case of a *pensioner* who dies, leaving a widow, and for the case of a *pensioner* who is a widow, but dies leaving children; and in both cases it says that "*the amount of the pension due to such pensioner at the time of his* (or her) *death*" shall be paid for the sole use of the children. It is incomprehensible how this law ever came to be understood as it has been by some of the officers of the pension bureau. There is not a word in it which could properly have been used to express the intention that children shall have the privilege of establishing a claim which their parent never made good.

For whose children does the act provide? For the children of pensioners. And who is a pensioner? One who receives a pension. It certainly does not include any but those who actually enjoy the bounty of the government in the shape of periodical payments. To say that a person is a pensioner for the reason that he might have become one by an act of his own, would be as gross a violation of the *jus et norma loquendi* as to call a man a soldier merely because he might have enlisted in the army if he had thought proper to do so.

But again: What is it that the act of 1840 gives to the children? Not the sum which their father or mother might have claimed and got, but the amount of *pension due* at the pensioner's death. An amount *due* is a sum presently payable, and implies that a time of payment has been fixed and fully expired. *The amount of pension due* means nothing, unless it means the amount of a gratuity payable at certain periods, but still remaining unpaid, although the time or times designated for its payment have gone by. There never was a revolutionary soldier who would have called himself a *pensioner*, or demanded anything as *due* upon a pension, before it was allowed and established, and a time fixed for paying it.

This is not all. The law of 1836 shows that Congress knew very well how to describe a revolutionary soldier who died without getting a pension. In that act they do not speak of him as a *pensioner*, nor call the claim of his widow or children a *pension due*; but "*any officer, non-commissioned officer, musician, soldier*, &c., whose services in the

revolutionary war were such as specified in this act of 1832," and who died within a certain time, to his widow or children shall be given the amount of pension *which would have accrued, &c.*

In the fourth section the soldier is described as "any person *who served* in the war of the revolution in the maner specified in the act of 1832," and to his widow is granted "the annuity or pension *which might have been allowed* to her husband." I have quoted this law for the purpose of showing that when Congress chose to provide for the widow or children of a soldier who had no pension in his lifetime they did so in words far different from those employed in the act of 1840.

I have now referred to and examined all the acts of Congress upon the subject, and I am brought to the conclusion that none of them will enable the children or grandchildren of a revolutionary soldier to sustain a claim against the government, based on the mere fact that their ancestor performed services for which a pension might have been allowed him.

But the Supreme Court is thought by some to have decided the contrary in Walton *vs.* Cotton, (19 Howard, 355.) I do not so understand that case. There was no such point in it. Nothing like the question I have been considering was raised, or discussed, or adjudicated. The Pension Office had permitted the administrator of a soldier's widow to apply for and recover a pension which had never been allowed to his decedent, and the only dispute was whether the living children should keep it all, or whether the distribution should be among the children and grandchildren *per stirpes.* The court decided in favor of the grandchildren's right to share it. The money in controversy had already been paid by the government, and both sides admitted it to have been rightly paid. There was no dispute except about the division. In such case the court could not get behind the issue made by the parties themselves. If the government had been legally there objecting to the right, I do not doubt that the decision would have been against both.

But the practice of allowing these claims has prevailed in the Pension Office for twenty-five years. It was supposed to be sanctioned by the high authority of Mr. Wirt, and certainly had the approval of Mr. Poinsett. It was doubted, however, by Mr. Woodbury, denied by Mr. Butler, and denounced as illegal by Mr. Cushing. Still it has maintained its ground in the office down to the present day.

Shall this practice continue? This is a question of mere administrative discretion which you must answer. I think I have shown that it is not supported by any law; and, under our system of government, to pay out public money without law is to pay it against law.

I am, respectfully, yours, &c.,

J. S. BLACK.

Hon. J. THOMPSON,
Secretary of the Interior.

IN THE COURT OF CLAIMS.—No. 523.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

This claim arises under an act of May 15, 1828, which gave to each of the surviving officers of the continental line in the revolution entitled to half-pay by the resolve of October 21, 1780, "the amount of his full pay in said line, according to his rank in the line," with a proviso, however, that he should not receive "a larger sum than the full pay of a captain in said line."

Dr. Thacher was a regimental surgeon in the army of the revolution, and his pay exceeded that of any captain; and the executive departments, in adjusting his claim under this act, have taken the pay of a "captain in said line" to be $40 per month. It is contended by the petitioners that this decision is erroneous; that some captains in the continental line received $50 per month; and that Dr. Thacher was entitled to the highest rate received by any captain in the continental line.

It is true, that while captains of infantry received but $40 per month, captains of engineers, artillery, and cavalry received $50; and two questions therefore arise:

1st. Whether captains of engineers, artillery, or cavalry were captains "in said line," within the meaning of the proviso? And

2d. If they were, does their pay constitute the limit imposed by the proviso, or is that limit the pay of infantry?

The word "line," even when used in a military sense, has various significations according to the facts to which it is to be applied.

In James' Military Dictionary, an English work, the line is said to embrace the numbered or marching regiments; and, again, to include *regulars*, except light troops, and similar corps, and excluding volunteers, militia, marines, &c.; and it further appears that certain troops may acquire that designation when serving *in the line*, and lose it when on other service. In the British service, the line might include some cavalry and artillery.

Our army in the revolution was modeled after the British, and Duane, who was an officer of the American army in the revolution, and published a military dictionary, copied James' definition of the "line." The State quotas of troops, which are uniformly designated in the resolutions of Congress as the State lines, and which, in the aggregate, constituted the continental line, embraced cavalry and artillery as well as infantry. It is undeniable, therefore, that captains of cavalry and artillery were captains in the continental line, and it was to such only that the act of May 15, 1828, gave pensions.

But were captains received different rates of pay, the grant of the pay of captain does not necessarily relate to the highest pay of a captain.

Surgeons in the army of the revolution were entitled to the half-pay of captains under resolution of January 17, 1781, and their half-pay, under that resolution, was computed at the rate of infantry pay, $40 per month. (Secretary of the Treasury, October 22, 1834, Mayo & Moulton, p. 502.) This has the force of a contemporaneous ascertainment of the "pay of a captain."

Another decision on this point is found in 10 Peters, 647, Wetmore *vs.* The United States. The plaintiff in error being entitled to the pay and emoluments of a major, claimed to be paid as a major of cavalry, instead of a major of infantry. The court remarking that infantry constituted the main body of modern armies, said: "We think military men must so understand it, because, in this, as in all other cases where distinct parts form the minor portion, the larger or main body is understood without particular designation, and the minor requires it, to ascertain with certainty what part is referred to as spoken of."

This reasoning would seem to be conclusive of the case, but the action of the department in executing the act of 1828 has not been in strict conformity with this decision of the Supreme Court in the case cited. For, according to that, the limit imposed by proviso in the act of 1828 is the pay of a captain of infantry, and as this limit is imposed upon every officer without distinction claiming pension under the act, it would follow that captains and higher officers of cavalry and artillery could not receive more than the pay of a captain of infantry, $40 per month, and yet they have been allowed the pay of their own corps, $50 per month. The proviso purports to fix one certain sum beyond which no pension can go, and it is difficult to perceive how this maximum can be construed to vary in different cases. There might have been reason in construing the limit according to the pay in the several corps, giving the infantry surgeons the pay of infantry captains, and artillery surgeons that of artillery captains; but such was not the course pusued by the Pension Office; nor would it benefit the present case, as Dr. Thacher was an infantry surgeon.

Again: the act of June 7, 1832, (4 Statutes, 529,) was passed for the benefit of officers and soldiers who had not served so as to be entitled to pensions under the act of 1828. The same limitation was imposed upon pensions; they were not to exceed the pay of a captain, and yet, under the act of 1832, surgeons were allowed the maximum of $50 per month. The difference between the two acts on which this distinction was made, is discussed in letters of the Commissioner of Pensions of March 15, 1843, and February 13, 1844, (Mayo & Moulton, 500, 501.) These letters show that the decision of the department in favor of the larger allowance to surgeons was not finally given till the year 1843.

A strict construction of the act of 1828 would exclude surgeons, as they were not "entitled to half-pay by the resolve of October 21, 1780," but, with others of the hospital department, were allowed half-pay by the resolution of January 17, 1781. But see, on this subject, the memorial from the hospital department and letter of General Washington, referred to in the proceedings of Congress of January 17, 1781, of which copies have been obtained from the Washington Papers in the State Department, and are on file in the case of George Stevenson's heirs *vs.* the United States, pending in this court.

The solicitor contends that the decision of the department under the act of 1828 was correct beyond any doubt, except such as is thrown upon it by the subsequent more liberal decisions in other cases.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.—No. 523.

JAMES THACHER'S REPRESENTATIVES *vs.* THE UNITED STATES.

Deputy Solicitor's brief on reargument.

On the first argument, the defence to this action was placed on two grounds: first, that, in fact, Dr. Thacher never was within the description of the act of 1828, under which the claim is made; and, second, that he received, during his life, all that he could have been entitled to under that act. I have but a few words to add upon these points.

As to the first point.

The act of 1828 only includes those officers who were "entitled to half-pay by the resolve of October 21, 1780." Although surgeons are mentioned in that resolve as belonging to the regiments, a true construction of it does not include them in the promise of half-pay.

In the year 1780 Congress was engaged in the work of re-modelling the army. On the 15th of July (3 Journals, 488) they arranged the quartermaster department; on the 30th of September (id., 526) the medical and hospital department; on the 3d and 21st of October (id., 532, 538) the regiments or line of the army; on the 30th of November (id., 521) the commissary department.

A separate clause in the resolve of October 21, 1780, or perhaps it might be called a separate resolve of that date, promises half-pay to the "officers" who should remain in service to the end of the war.

As surgeons are named in the resolve of October 21 as belonging to the regiments, it is plausibly contended that even if the promise of half-pay in that resolve be confined to the officers therein mentioned the surgeons will still be included.

But, in fact, Congress intended neither to confine the promise of half-pay to the officers mentioned in the resolve, nor to extend it to all therein mentioned. The history of the half-pay system places this beyond doubt.

It is historically known that the half-pay establishment was adopted by Congress upon the urgent solicitation of General Washington.

In January, 1778, Washington urged the measure upon Congress, (see his letter, printed in a foot note, 4 Journals, 211,) and Congress granted half-pay for seven years by resolution of May 15, 1778, (2 Journals, 554,) limiting the grant to "military officers commissioned by Congress." The surgeons, I believe, were not commissioned by Congress. This grant was continued by resolution of October 3, 1780, reorganizing the line, using, however, the descriptive term of "officers," there being none other than military officers named in the resolution. This resolution of October 3d was passed, subject to the approval of the commander-in-chief. In a communication to Congress, dated October 11, 1780, (printed in a foot note, 4 Journals, 212,) Washington recommended, among other modifications of the

resolution of October 3, 1780, that the grant of half-pay should be extended for life. This was done by the resolution of October 21, 1780. It nowhere appears that it was the design of Congress, in the resolutions of October 3d and 21st, to embrace new classes of officers. This, however, was done by subsequent resolutions—to general officers, by resolution of November 28, 1780, (3 Journals, 551,) to medical officers, by resolution of January 17, 1781, (id., 569,) and to chaplains, by resolution of May 8, 1781, (id., 617.)

The resolution of January 17, 1781, extending the grant of half-pay to medical officers, is stated in the preamble to have been passed upon consideration of a letter from General Washington, dated November 5, 1780. A copy of that communication is filed in this case.

It there appears that the hospital surgeons chose to consider the resolution of October 21, 1780, as giving the regimental surgeons half-pay; and thereupon they claimed the same provision. General Washington doubted, and asked the directions of Congress, which were given in the resolution of January 17, 1781. This resolution ignores all claim under the resolution of October 21, 1781, and makes an original grant of half-pay to all medical officers, thus showing by legislative construction that the medical officers were not within that resolve. On the other hand, the resolution of November 28, 1780, providing for general officers, declares expressly that the resolve of October 21, 1780, was intended to include such officers, although these were not among the officers mentioned in the latter resolve.

Again, if surgeons were embraced by the resolve of October 21, 1780, so were surgeons' mates—for both stand in that resolve on precisely the same ground—but surgeons' mates were not allowed half-pay by the resolution of January 17, 1781, nor have they ever received it to this day. If the construction contended for be correct, and surgeons be decided to be within the resolve of October 21, 1780, the heirs of surgeons' mates had a valid claim under that resolution, which has never yet been recognized by the government.

Again, when Baird's representatives sued in this court for half-pay, this court gave judgment for half-pay, not under the resolve of October 21, 1780, which would have given half his own pay, or $390 per annum, but half-pay under the resolve of January 17, 1780, which limited it to the rate of a captain, $240 per annum.

The language of the act of 1828 itself gives a construction to the resolve of October 21, 1780. It provides for all the officers entitled to half-pay under that resolve, and gives them an annuity according to their "rank in the line," clearly implying that all the officers entitled to half-pay by the resolve of October 21, 1780, had "rank in the line," and so they had if surgeons be excluded; but surgeons had no rank either in the line or elsewhere.

As to the second point.

The intention of the act of 1828, in graduating the annuity according to ranks in the line, may be thus illustrated. An infantry lieutenant's pay, *according to his rank in the line*, was $26\frac{2}{3}$ per month;

if he acted as adjutant he got $13 more, or if as paymaster $20 more; and he had besides certain emoluments.—(See General Washington's letter of November 5, 1780, above referred to.) The act of 1828 intended to refer to the $26\frac{2}{3}$ and make that the standard.

Now, a surgeon received a gross sum as compensation, but if this compensation had been subdivided into pay, rations, &c., &c., as was the case in the line, his pay would not have exceeded that of a captain of infantry, (see Washington's letter, and resolution of January 17, 1781,) and consequently this would have been by the act, as it has been made by the department, the measure of his pension. The reason assigned by General Washington against allowing surgeons half their own monthly pay as a retiring pension, apply with equal force against taking that pay as the basis of pension under the act of 1828. General Washington evidently means to say that the compensation of a surgeon as compared with that of infantry officers is not more than equal to a captain's compensation, though his *pay*, literally taken, is greater, and it is only on a strictly literal construction of the act of 1828 that the surgeon claims a higher allowance than the infantry, viz: that his *pay* as pay, and not his gross compensation, was greater.

This reasoning, moreover, brings the department's decision clearly within the ruling of the Supreme Court in 15 Peters, cited for petitioner, in regard to the limitation imposed by the proviso, because we thus show that in confining the petitioner to the pay of an infantry captain, we bring it "within the words as well as within the *reason* thereof."

The whole difficulty in this case arises from two errors of the department. *First*, in admitting a claim under the act of 1828, which was not embraced by it, and to which, consequently, the provisions of the act intended to regulate the amount of pension could not without strained construction, be made to apply; and, *second*, in afterwards (though not till 1843) admitting that surgeons under another act, precisely similar in substance to the act of 1828, were entitled to more than had been allowed under the latter act.

As to the third point.

This involves the right of Thacher's representatives to receive a larger rate of pension than he received in his lifetime. This question has been so thoroughly discussed by Attorney General Cushing in his opinion in the case of the heirs of Keziah Dow, (8 Opinions Attorney General, 198,) and by Attorney General Black in his opinion in Deborah Grant's case of September 19, 1857, that I deem it necessary only to refer to these opinions.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

JAMES THACHER'S HEIRS *vs.* THE UNITED STATES.

Brief on reargument.

The petition claims the difference between the pay of captain of infantry and that of artillery and cavalry, under a pension awarded to James Thacher under the act of the 15th of May, 1828.

Facts as understood by the solicitor.

1. James Thacher was appointed and served more than two years as a surgeon of regiments of infantry.
2. That under the act of May 15, 1828 he applied for a pension, and one was granted to him at the rate of compensation allowed to a captain of infantry, ($480 per annum,) which he drew until after the passage of the act of the 7th of June, 1832. That his pension dated back to the 3d of March, 1826.
3. That Thacher relinquished all claim under all former acts of Congress, and applied for and obtained a pension under the act of 1832, which he continued to receive until the time of his death in 1837, and under this act of 1832 he drew the full pay of a captain of artillery, which increased his pension from $480 to $600 per annum.
4. That the petitioners are the children of the said James Thacher.

Legal propositions.

First. *The act of May* 15, 1828, *did not authorize the granting of a pension to Thacher at a greater rate of compensation than allowed, if he was entitled to any, being that of a captain of infantry.*

The material part of the act of 1828 (4 U. S. L., 269, § 1) is in these words:

"That each of the surviving officers of the army of the revolution in the *continental line*, who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive, out of any money in the treasury not otherwise appropriated, the amount of his full pay in *said line*, according to his *rank in the line*, to begin on the 3d of March, 1826, and to continue during his natural life: *Provided*, that, under this act no officer shall be entitled to receive a larger sum than the full pay of a captain in *said line*."

The true meaning of this provision is the first question in this case. The statute limits the pension to the pay of a captain "in said line." The claimant insists that there were different corps in the continental line receiving different rates of compensation. It is this fact which creates the embarrassment on this point; but is rather nominal than real, and grows out of the omission of a palpable duty on the part of the claimants in stating their case and in making proof.

1. The legislator intended to provide for the cases as they existed.

A colonel of cavalry would receive the full pay of a captain of cavalry; a colonel of infantry would receive the full pay of a captain of infantry; a surgeon of a regiment of cavalry would receive that of a captain in that corps, and a surgeon of a regiment of infantry would receive that of an infantry captain.

2. The embarrassment grows out, not of the law, or its difficulty of construction, but out of the fact that the claimants have not stated or proved to which corps their ancestor belonged. Had they stated and *proved* that he served as surgeon in a regiment of cavalry or artillery, it would then be manifest that he was entitled to the higher grade of pay. But the petition and evidence are silent upon that point. Not having averred that he belonged to either of those corps, or proved the fact, the case must be disposed of as if no such corps existed. He was not a member of any such corps while in commission and serving as a surgeon. They have not made out a case of such service, and therefore cannot claim anything depending such service.

3. The service performed was that of surgeon of infantry.

The case presented in the petition and proof establishes this proposition. It is conceded that the ancestor served in some corps, and such is the proof. There were three distinct corps, it is understood, each forming a part of the "continental line." If Thatcher had served in one of those entitled to the highest rate of compensation, and the petitioners claim upon that ground, it was their duty to avow and prove such higher service. Not having done so, the conclusion is irresistable that he did not serve in either of those corps, but served in the one entitled to lower grade of pay. The government cannot admit a higher grade of service than is claimed, and the claim, in this case, does not extend to the higher grades.

4. The court cannot, after the word "captain" in the proviso of the act of 1828, interpolate the words "of cavalry," or "of artillery," so as to make the proviso mean what it does not express.

The claimants ask the court to make, in effect, this change in the words of the law. They ask this to be done, when they do not aver that their ancestor did serve in either of those military arms. They ask the court to accomplish this by construction so as to give those of all these corps the same compensation. They ask, in effect, that the infantry captain, and all infantry officers above the grade of captain, may receive the compensation paid to a corps in which they never served. This cannot be done by mere construction.

The claimants should have proved to which corps their ancestor belonged, and then all difficulty would have vanished.

In Wetmore *vs.* The United States 10 Pet., 647, pp. 653, 655, the Supreme Court considered a case analogous to this. The court held, that the word "cavalry" could not be interpolated so as to increase compensation from infantry to cavalry pay. They said when the word "major" "is used without regimental designation, it implies major of infantry; this arm of defence having been made the main body of modern armies. We think military men must so understand it; because, in this as in all other cases, where distinct parts form the minor portion, the larger or main body is understood without

particular designation, and the minor requires it to ascertain with certainty what part is referred to as spoken of."

If I am not correct in supposing that the intention of the act of 1828 was to give each corps in the continental line its own compensation, then the ruling in Wetmore's case, as above cited, requires all of them to be reduced to the infantry standard. The effect upon the claimants would be the same. In no event can they claim beyond infantry pay.

If I am right in this, then there is no balance due to their ancestor for them to claim.

Second. *The decision of the War Department in awarding the pension is conclusive upon the ancestor and those claiming under him, and this court cannot review it and confer a larger one.*

The laws of Congress established a special tribunal to adjudicate upon pension applications. They also provided in what cases persons should be entitled to pensions. The parties claiming applied to that tribunal and presented their evidence. It considered and adjudicated the case, and that decision was executed. No appellate tribunal was established, although the President might, if he chose, overrule the action of the Secretary of War and cause his own to be carried into effect.

In the present case, the ancestor applied, presented his evidence, and the department passed upon it, and gave him a pension equal to the pay of a captain of infantry, which he accepted and received and continued to draw for several years. Whether the department decided right or not, this court has no means of knowing. It is not constituted a tribunal of review, and if it were, it has not the evidence before the department so as to be able to determine whether it decided right or not. It may, and probably did, appear, on that application, that Thacher was a surgeon of infantry, and if so the whole ground of controversy must disappear, because he received all he was entitled to under the act of 1828.

The department passed upon his whole case as he chose to present it, and a decision upon it as presented, when a pension was granted, ended the matter.

If Thacher was not satisfied with it, he should have secured the review of the President, or refused to receive the certificate of pension. Neither he nor his descendants can split up one entire demand into different parcels and prosecute them one at a time. It is true that the Pension Office has sometimes reversed its own decisions, and in others granted a new trial, and received further evidence; but this was never authorized by law, and has been fruitful in bad results. But if that office could do so, it does not follow that this court can either review the decision of the department, or Pension Office, or grant a new trial, and receive additional evidence, with the view of increasing the gratuity previously adjudicated upon. The utmost that can be claimed for this court is, to consider rejected cases. But where the original action was in favor of the claimant, and he accepted what was awarded, he cannot come here and ask to have that award increased upon the ground that the amount was less than the

party claimed, or less than he might have obtained had he fully stated and proved his whole case.

In this case, the claimants, in effect, ask this court to declare that the War Department ought to have given their ancestor a pension to the amount of the pay of a captain of artillery, when there is no evidence but what he decided right in giving him only the pay of a captain of infantry. This court cannot exercise any such authority; but if it could, it is not shown that any error was in fact committed by the Secretary of War.

The claimants rest their construction of the act of 1828 upon that said to have been given to that of 1832. They insist that Thacher surrendered his certificate of pension under the act of 1828, and that he received one under the act of 1832 for the amount of full pay to a captain of artillery.

What was done under the act of 1832 cannot prove that the action under the act of 1828 was erroneous. If the two acts are the same in legal effect, the action under the act of 1832 no more proves error in that under the act of 1828, than the action under the latter proves error under the former. The action under the act of 1828 may as well be taken as the standard of perfection as that under the act of 1832. The point to be established by the claimants is, that the action under the law of 1828 was wrong.

The error is equally as probable under the last as under the first law.

But in fact the two acts are, in many respects, quite different. The act of 1828 was exclusively applicable to those officers in the continental line who were entitled to half-pay under the resolution of 1780.

The act of 1832 *expressly excluded this class* and included soldiers, &c, as well as officers, who had served in the continental line, not provided for by the act of 1828, and also *State troops, volunteers, and militia.* The limitation of the amount of payment is in these words, (4 v. 530:)

"The amount of his full pay in the said line, according to his rank, but not exceeding, in any case, the pay of a captain in said line."

This provision is more explicit than that in the act of 1828, because it introduces the rank of the officer as an element of description and limitation. It clearly intended to give the cavalry, artillery, and infantry officers, each the pay of his respective rank, but not beyond that due to a captain in his corps.

The construction should have been that which was given to the act of 1828. If a different one was given, it was clearly erroneous. But we do not know that a different one was given in this case, because we do not know what was shown under the application made pursuant to the law of 1832. Thacher may have proved, on that application, that he was a surgeon of and served in a regiment of cavalry or artillery. If he did not, then the Pension Office gave an erroneous decision.

In allowing him to surrender his pension certificate under the act of 1828, and giving him one under the act of 1832, the office made a clear mistake. Those *entitled* to the benefit of the former act are clearly excluded. The words of the act are:

"That each of the surviving officers * * who shall have served in the continental or State troops, volunteers or militia, at one or more terms, a period of two years during the war of the revolution, and *who are not entitled to any benefit under the act for the relief of certain surviving officers and soldiers of the revolution passed the fifteenth of May*, 1828, *be authorized to receive*," &c.

By this provision Thacher was expressly excluded, because he was provided for under that act, and had actually availed himself of the provision.

The second section, which authorizes the relinquishment of further claims to former pensions and annuities, does not enlarge the first section of the act. It reads as follows:

"That no person receiving any annuity or pension under any law of the United States providing for revolutionary officers and soldiers, shall be entitled to the benefits of this act unless he shall first relinquish his further claim to such pension; and in all payments under this act the amount which may have been received under any other act as aforesaid since the date at which the payments under this act shall commence, shall first be deducted from such payment."

Clearly this provision does not repeal that contained in the first section, which excludes the officers provided for in the act of 1828 from receiving anything under the act. Prior to 1832 there had been numerous pension acts, some providing for classes and others for individuals. This section applies to these acts.

The pension act of March 18, 1818, (3 U. S. L., 410,) only gave officers $20 per month. Various private acts, several hundred of which will be found in the 6th volume, (Private Laws,) give less amounts than that specified in the act of 1832. As a specimen, see one at page 23, passed in 1796, which provides for hundreds of invalid pensioners varying from one-fourth to full pay. The second section of the act of 1832 applies to these classes of cases and gives full pensions upon the surrender of old pensions. If the Pension Office applied this 2d section to the officers and men provided for by the act of 1828, it did so without authority of law. There was no object for including them under the 2d section of the act of 1832, because the amount of pension provided in the latter act and the period of its continuance were precisely the same as under the act of 1828. To surrender one certificate and receive another of the precise same description would be an idle ceremony.

It is plain upon the face of this second section that it relates to those who were, under some former law, receiving a smaller rate of pension, which it was intended to increase by it. It did not look to the correction of mistakes committed under any former law, but to placing all who were receiving pensions upon an equal footing with those who were about to receive under the first section of the act.

If it is true, as alleged by the claimants, that Thatcher surrendered his certificate under the act of 1828, and obtained one for a larger amount under that of 1832, a mistake was committed against the government, which, instead of being indebted for deficiencies of several years, is entitled to have the excess received after 1832 refunded. The fact that the government has suffered by a blunder of the Pension

Office, lays no just foundation for repeating that blunder in this court.

Third. *If Thacher in his lifetime had a legal right to an increased pension, that right has not devolved upon his children.*

The act of 1828 authorized each surviving officer who was entitled to half-pay under the resolution of the 21st of October, 1780, and each surviving non-commissioned officer, musician, and private who enlisted during the war, and served therein, so as to be entitled to the reward of $80, to receive pensions during their lives, and it was declared by the act that it "shall inure wholly to the personal benefit of the officer or soldier entitled thereto under this act."

The 5th section of the act provides:

"That so much of said pay as accrued by the provisions of this act before the 3d of March, 1828, shall be paid to the officers and soldiers entitled to the same, as soon as may be, in the manner and under the provisions above mentioned; and the pay which shall accrue after said day shall be paid semi-annually, in like manner, and under the same provisions."

Under these provisions the claimants insist that they are entitled to receive as his children whatever Thacher might have received for himself. This right is distinctly denied, and forms a prominent issue between the parties.

1. The subject matter is not a contract, but a gratuity, which the government was not bound to make, and hence its protection of it from creditors. The law might have been repealed at any time at the pleasure of Congress, or altered so as to exclude a portion of those receiving pensions, as was the case under the law of May 1, 1820, (3 U. S. L., 659,) which excluded from the pension roll those whom the Secretary of War deemed not indigent. The giving gratuities and their continuation depends exclusively upon the will of the giver. If A promises to give B a dollar a day, when there is no contract between them, A is not bound to continue his payments longer than he chooses. He may cease them at his pleasure. It is so with pensions. The legal right never extends beyond that which is actually paid over. It is a perversion of language to call a general pension law a contract, the advantages of which may pass by law to the legal representatives of the pensioner, unless so expressly provided by statute, and when provided that it shall pass in a particular manner, that law may be repealed. This case is one of simple gratuity not reduced to possession.

2. The act itself makes no provision authorizing any other person than the surviving officer or soldier to derive any benefit whatever from this act. By its very terms it is confined to him and him alone. If Congress had intended that children should take where the party provided for was dead, it would have so said. But there is not a word upon that subject in the act. If the law is a contract, then Congress could not control the fund so as to screen it from creditors. It would be left to go to the legal representatives, where it might be applied to pay funeral expenses and debts, if he owed any.

But the act stops short after providing for the life of the meritorious

cause, (the person who served in the war,) and makes no provision beyond, and doubtless this was the deliberate intention of the law makers.

It is not pretended that this particular act authorizes in terms the heirs or legal representatives to claim any balance due. But it assumes that the act creates a vested right, and therefore the *heirs* are entitled to it.

But if it creates a vested right, it does not go to the heirs, but to the succession, and if, after paying debts, there shall be a balance remaining with the executor or administrator, it is to be distributed according to the law of the decedent's domicil, giving the widow, where there is one, her share, and then to the children and their representatives, as the laws of the State may provide. If the claim now set up grows out of a vested legal right, the present claimants have no rights whatever. They are not the persons entitled.

But Congress itself, by the act of the 2d of March, 1829, (4 U. S. L., 350,) second section, has provided:

"That whenever any revolutionary pensioner shall die, the Secretary of War shall cause to be paid the arrears of pension due to the said pensioner at the time of his death; and all payments under this act shall be made to the widow of the deceased pensioner, or to her attorney, or if he left no widow, or she be dead, to the children of the pensioner, or to their guardian, or his attorney, and if no child or children, then to the legal representatives of the deceased."

1. If there was a vested right under a contract, Congress would not have been legislating upon the subject.

2. And if they had, they could not have changed the effect of the contract under the laws of the pensioner's domicil.

3. It is clear that by this section Congress intended to provide for the case of undrawn accruing pension up to the time of the pensioner's death, which was not provided for in the act of 1828.

4. That Congress believed it had the power, and exercised it, of providing for the disposition of the undrawn accruing pension, and that it made its own disposition of it, in a manner different from what the laws dispose of a vested contract right, by giving first to the widow, then to the children, and if neither, then to the legal representatives.

5. These special provisions would not have been made if Congress believed that there was a previous legal vested right giving direction to the whole.

6. Congress would not have been legislating for the fraction of a year, if, in the shape of a vested contract right, the same had been included and disposed of under the law of 1828. The law was passed for the very reason that the law of 1828 did not apply to or cover it.

7. This act of 1829 did not apply or cover anything except the pension which had been granted and had accrued between the last time of drawing and the death of the pensioner. The words "arrears of pension" only apply to a case where a pension has been established and has been in part drawn, but some part has been left undrawn. The words "*due to a pensioner* at the time of his death" refer to and

describe a gratuity accorded to a particular person, and which had a previous beginning, but terminated at his death.

8. No one can be a *pensioner* who has not been adjudged to be such under a law, and that adjudication reduced to productive form by inscription on a roll or by granting a certificate.

If Congress had designed to provide that whatever an officer might have received may be received by his widow or children after his death, they would have said so in intelligible language, instead of providing for payment of what accrued between the time of the last payment and the pensioner's death.

The claimants next invoke the act of June 19, 1840. (5 U. S. L., 385.) This act has the following title:

"An act making provision for the payment of *pensions* to the executors and administrators of deceased *pensioners*, in certain cases."

Now such an act would not be needed if the act of 1828 was a *contract* and conferred a *vested right* in the person performing service, because the existing general laws of the States would have placed in the hands of his executors or administrators without the aid of a law of Congress.

But Congress, instead of treating these pensions as a *vested* right, assumed control of the subject, and made provisions wholly inconsistent with the idea of vested rights. If there had been vested rights they would have remained a part of the pensioner's estate, and would have gone first to pay his debts. But Congress said, in effect, these are not vested rights, and we will give the direction of our bounty, first to the worthy cause, and then to those dependent upon him, that is, to the widow, and if none, then to his executor or administrator for the benefit of his children, and no part shall go to pay his debts. The first section of the act of 1840, which is prospective only, provides:

"That in case any male *pensioner* shall die, leaving children, but no widow, the amount of *pension* due to such *pensioner* at the *time of his death*, shall be paid to the executor or administrator on the estate of such *pensioner* for the sole and exclusive benefit of the children, to be by him distributed among them in equal shares, and the same shall not be considered as a *part of the assets of said estate*, nor liable to be applied to the *payment of the debts* of said estate in any case whatever."

This provision, like that of the act of 1829, relates exclusively to the amount of the unpaid pension evidenced by the usual certificate, and not to matters which might be made the foundation of a claim of a pension. If there had been no pension granted, then there could be none due.

If, on the soldier's death, the claim would pass to the legal representative as a part of the legal estate, no law was necessary to give it to the executors and administrators. Nor could Congress order them not to pay debts, but to give it to the children of the deceased.

The second section provides:

"That in case any *pensioner* who is a widow shall die, leaving children, the amount of *pension* due at the time of her death shall be paid to the executor or administrator for the benefit of her children, as directed in the foregoing section."

The third section provides:

"That in the case of the death of any *pensioner*, whether male or female, leaving children, the amount of *pension* may be paid to any one or each of them, as they may prefer, without the intervention of an administrator.

Here, again, Congress interfered directly to declare what should be done with its bounty, which it could not have done, if the act of 1828 or that of 1832 created a vested right.

The great error, by whomsoever committed or approved, lies in the fact of treating pensions not actually granted and received, as vested legal rights. Congress has not so treated them, and by no rule of legal construction or analogy can they be considered such.

There is high authority for this position. Attorney General Cushing, in *Oo-la-ya-tah's* case, (7 Op., 619,) where this question was distinctly presented, held:

"Where the pension acts omit to make mention of representative persons, the latter are not entitled according to the tenor and true intendment of the acts.

"The revolutionary pension acts have been so long misconstrued in this respect, that it seems too late to return to their proper construction.

"But no such misconstruction of the invalid pension acts has obtained in practice, nor can it now be allowed.

"Cherokee Indians, entitled to invalid pensions by treaty, have no larger rights in this respect than officers and soldiers of the army.

"Hence, a pension claimable, but not claimed by a Cherokee in his lifetime, does not descend as arrears to his legal representatives."

The above are his own head notes to an elaborate opinion, which demonstrates the correctness of the opinion that representatives do not take.

In Lovering's case, (7 Op., 717,) Mr. Cushing repeated these views. He held:

"Arrearages of pensions, claimed and adjudicated, belong to the representatives of the party on his decease, as a debt due from the government."

"*Secus*, when the right to claim a pension exists, but the right has not been asserted by the party in his lifetime.

"An exception to this rule has been established in practice, by misconstruction of the statute in favor of the children of persons entitled by reason of service in the revolutionary war.

"While it may be inexpedient to disturb this practice now, it cannot be extended by further misconstruction beyond the case of children."

This opinion was reiterated in the case of Keziah Dow, (8 Op., 198,) in which, at page 200, he says:

"There is also a class of enactments, which in express terms grant a pension to certain persons in the right of the officer or soldier who served, and these enactments are conclusive to the same point—that is, they negative the supposition that as a general doctrine of statute, it ever was intended that pensions *in posse* are a vested right, are the property of the pensioner *in posse*, and so pass of right to the repre-

sentative persons. It is impossible to find negations by implication stronger than these in any act of Congress."

Mr. Cushing's reasoning on this point cannot be overthrown. His only error is in yielding to the suggestion that past practice sanctifies a positive violation of law, and therefore, that such violation may continue. This doctrine cannot be sustained. If the law has been violated, and that is known, it is the duty of courts to say so, and put an end to it. What is clear law should never be violated upon the ground of past reputation. This doctrine would sanction crime, for the known violation of a law is crime. A judge sworn to administer the law cannot justify himself upon the assumption that other judges have done so. It is his duty to administer the law as he knows it to exist.

Attorney General Black met this question and decided it in Deborah Grant's case. He held that grandchildren were not entitled to come in and claim a pension that their grand parent might have claimed, but did not upon the express ground that the children were not entitled. He shows that the case of Walton *vs.* Colton, 19 How., 355, had no bearing upon the question, because there was no such point in the case.

In that case neither side disputed the right of the childen to take. The one side had received the fund upon the claim of the children, and did not stultify itself by saying that it had illegally received it. The other side also claimed that not only the children, but grandchildren, were entitled. Instead of disputing the right of the children to receive, both were interested in sustaining that right, and hence neither questioned it. The court merely held, that what a child had received ought to be distributed to representative grandchildren. That case is no authority for the ground assumed by the present claimant.

It is a melancholy exhibition of recklessness to see claims pressed when the main ground upon which they are rested is not that the law as passed by Congress authorized it, but that misconstruction has prevailed too long to be corrected.

This misconstruction has drawn its millions from the treasury, and given it, not to the worthy objects intended to be benefited by Congress, but to those who have no claims upon the treasury superior to any other citizen.

Fourth. *Thacher was not an officer in the continental line, and therefore was not entitled to a pension under the act of* 1828.

The act of 1828 provided, not for all officers, but for those in the "*continental line*," according to their "*rank in the line.*"

Surgeons and surgeons' mates were not in fact officers of the line, nor had they rank in the line, although they may have been in the continental service, and even may have been, under some resolution, entitled to half-pay for life.

The claimants do not show that their ancestor belonged to the *line*, but state facts which show that he could not have done so. They show that he was in the *staff*, and not the *line*.

It follows that he was erroneously placed upon the pension roll under the law of 1828. He was not, in truth, entitled to a pension

until the passage of the act of 1832, and then to such an amount as his position in the corps in which he served entitled him.

This part of the case is fully discussed in Mr. McPherson's brief on the reargument, and will not be further pursued.

R. H. GILLET,
Solicitor.

JUNE 17, 1858.

APPENDIX.

Opinion of the Attorney General on the rights of children and grandchildren of revolutionary soldiers to receive pensions.

ATTORNEY GENERAL'S OFFICE,
September 19, 1857.

SIR: I have received your letter on the application made by the grandchildren of Deborah Grant for the pension to which they allege she was entitled, and have examined the papers by which it was accompanied.

Mrs. Grant first began to receive a pension in 1839; it was increased in 1841, and in 1853 she applied for a still further increase, alleging that the services performed by her husband entitled her to a larger pension than either of the previous decisions of the office had given her. Pending this last appropriation, she died, leaving grandchildren, but no children living. The grandchildren now renew the application.

As to the increase applied for in 1853, but never allowed, that must be regarded as an unestablished claim to a pension. The mere application made in her lifetime does not make the right of her children any better than it would have been if she had never applied at all.

I take it for granted that her grandchildren have proofs sufficient to show that she, in her lifetime, was entitled to receive what they now claim as her representatives. Nor will I stop to discuss the question whether the grandchildren of a pensioner have or have not the same rights that children have. It is settled by the Supreme Court (19 How., 355,) that they stand on equal ground. What has been decided by that tribunal is not, and ought not to be, open to further dispute.

It is also very clear that pensions due to widows will descend to their children or grandchildren just in the same way that pensions coming to revolutionary soldiers themselves will descend to theirs.

These principles being thus settled, the case before me, and the question arising on it, may be put thus: A soldier of the revolution who might have got himself placed on the pension roll, and received from the government a pension during his natural life, has died without doing so; can his children, after his death, get all that he might have got in his lifetime on the production of the same proofs?

Before this question can be answered in the affirmative, the right of the children must be shown by some act of Congress, which gives

it to them, either expressly or by very clear implication. The non-existence of a law to forbid it proves nothing. Every claim upon the public money must be made out affirmatively by the claimant. The burden of proving that such a demand is *not* well founded, never lies upon the government. No man can be allowed to take from the treasury what Congress has not given; and Congress gives nothing except when the intention to do so is expressed in plain and unambiguous words.

It is utterly in vain to argue that the annuity which the law authorizes a soldier to receive is property, in which he has a vested right, and descendible like money secured to him by a bond. It is not so. If it were, Congress would have no power to say whom it should go to after the death of the pensioner, for Congress cannot regulate the descent or distribution of property in the States. It would necessarily pass by the law of succession which prevails at the place of the pensioner's domicil. But it is a mere gratuity, which the government may and does bestow on whom it pleases. If it be not extended beyond the immediate object of the bounty, his representatives can have no interest in it. If it be so extended, the representatives take it as a favor, and not a right. It is for this reason alone that Congress, without regard to the law of the State, has always exercised the power of saying to whom the arrearages of a pension shall be paid when the pensioner dies. It is given to a widow in exclusion of children, and in other cases to children in exclusion of collateral kindred and creditors. This right of bestowing it on some classes of relatives, while others, equally entitled in justice and preferred by the general rules of law, are forbidden to enjoy it, springs entirely out of the right to withhold it from all of them. It follows, that if the children of a revolutionary soldier can get the pension due to their ancestor, they must get it pursuance of some positive law to that effect. Nothing remains, therefore, but to see whether Congress has made any provision which authorizes the children of a deceased soldier to prove the services of their parent, and get the pension which might have been awarded to him.

The second and third sections of the act of 1836 (5 U. S. L , 128) were manifestly and plainly intended to give certain representatives of deceased soldiers the privilege of establishing claims never established by the soldiers themselves. But the second section does not cover this case, because it refers only to those soldiers who died between the fourth of March, 1831, and the seventh of June, 1832. The third section is equally inapplicable; for it was intended solely to substitute the widow of a soldier as a pensioner in his place, upon proof by her of his services. Children are not spoken of.

The act of 1832, (4 U. S. L., 530,) in the fourth section, provides for the case of a pensioner dying between the semi-annual pay days, and directs that the proportionate amount accruing between the last pay day and the time of his death shall be paid to his widow, or, if he left no widow, to his children. This refers so clearly to a pensioner actually put on the roll in his lifetime, that nobody pretends to claim anything under it for the children of a soldier who died without being a pensioner. If there were no other law on the subject, I should have

my doubts whether the children of a pensioner could recover for what accrued further back than from the last pay day before his death, though one or several full payments might be due.

But the act of 1829, section 1, (4 U. S. L., 350,) declares that "whenever *any* revolutionary pensioner shall die the *arrears* of pension *due* to the said pensioner at the time of his death," shall be paid to his widow, or, if he left no widow, to his children. There is one consideration which sets aside all pretence of claim under this law in a case like the present. It provides only for the payment of *arrears*. This word has a signification as definite and well known as any other in the language. It means a balance—one portion left behind another portion—a sum still remaining unpaid, after payment of a part. Unless a pensioner received a part of his pension during his life, (and he could not do that without being on the pension roll,) there can be no such thing as *arrears* at his death. There are other reasons equally potent in favor of the same construction; but they will be embraced in what I have to say about the act of 1840.

That act (5 U. S. L., 385,) provides for the case of a *pensioner* who dies leaving a widow, and for the case of a *pensioner* who is a widow, but dies leaving children; and in both cases it says that "*the amount of the pension due to such pensioner at the time of his* (or her) *death*" shall be paid for the sole use of the children. It is incomprehensible how this law ever came to be understood as it has been by some of the officers of the pension bureau. There is not a word in it which could properly have been used to express the intention that children shall have the privilege of establishing a claim which their parent never made good.

For whose children does the act provide? For the children of pensioners. And who is a pensioner? One who receives a pension. It certainly does not include any but those who actually enjoy the bounty of the government in the shape of periodical payments. To say that a person is a pensioner for the reason that he might have become one by an act of his own, would be as gross a violation of the *jus et norma loquendi* as to call a man a soldier merely because he might have enlisted in the army if he had thought proper to do so.

But again: what is it that the act of 1840 gives to the children? Not the sum which their father or mother might have claimed and got, but the amount of *pension due* at the pensioner's death. An amount *due* is a sum presently payable, and implies that a time of payment has been fixed and fully expired. *The amount of pension due* means nothing unless it means the amount of a gratuity payable at certain periods, but still remaining unpaid, although the time or times designated for its payment have gone by. There never was a revolutionary soldier who would have called himself *pensioner*, or demanded anything as *due* upon a pension before it was allowed and established, and a time fixed for paying it.

This is not all. The law of 1836 shows that Congress knew very well how to describe a revolutionary soldier who died without getting a pension. In that act they do not speak of him as a *pensioner*, nor call the claim of his widow or children a *pension due;* but "*any officer, non-commissioned officer, musician, soldier, &c.*, whose services in the

revolutionary war were such as specified in this act of 1832," and who died within a certain time—to his widow or children shall be given the amount of pension *which would have accrued, &c.* In the fourth section, the soldier is described as "any person *who served in* the war of the revolution in the manner specified in the act of 1832," and to his widow is granted "the annuity or pension *which might have been allowed* to her husband." I have quoted this law for the purpose of showing that when Congress chose to provide for the widow or children of a soldier who had no pension in his lifetime, they did so in words far different from those employed in the act of 1840.

I have now referred to and examined all the acts of Congress upon the subject, and I am brought to the conclusion that none of them will enable the children or grandchildren of a revolutionary soldier to sustain a claim against the government based on the mere fact that their ancestor performed services for which a pension might have been allowed him.

But the Supreme Court is thought by some to have decided the contrary in Walton *vs.* Colton, (19 Howard, 355.) I do not so understand that case. There was no such point in it. Nothing like the question I have been considering was raised, or discussed, or adjudicated. The Pension Office had permitted the administrator of a soldier's widow to apply for and recover a pension which had never been allowed to his decedent, and the only dispute was, whether the living children should keep it all, or whether the distribution should be among the children and grandchildren *per stirpes.* They decided in favor of the grandchildrens' right to share it. The money in controversy had already been paid by the government, and both sides admitted it to have been rightly paid. There was no dispute except about the division. In such case the court could not get behind the issue made by the parties themselves. If the government had been legally there objecting to the right, I do not doubt that the decision would have been against both.

But the practice of allowing these claims has prevailed in the Pension Office for twenty-five years. It was supposed to be sanctioned by the high authority of Mr. Wirt, and certainly had the approval of Mr. Poinsett. It was doubted, however, by Mr. Woodbury, denied by Mr. Butler, and denounced as illegal by Mr. Cushing. Still it has maintained its ground in the office down to the present day.

Shall this practice continue? That is a question of mere administrative discretion, which you must answer. I think I have shown that it is not supported by any law, and under our system of government to pay out public money without law is to pay it against law.

I am, respectfully, yours, &c.,

J. S. BLACK.

Hon. J. THOMPSON,
Secretary of the Interior.

HEIRS OF DR. JAMES THATCHER *vs.* THE UNITED STATES.

Brief for petitioners.

The solicitor having indulged me to read his brief in the *case* of Dr. Thacher, which I had the honor to submit for your consideration, beg to make a few remarks in reply.

There are two questions made:

1st. Whether captains of engineers, artillery, or cavalry, were captains in "said line," within the meaning of the proviso;

And 2d. If they were, does their pay constitute the limit imposed by the proviso, or is that limit the pay of infantry?

The first question I answer in the affirmative. The second in the negative.

First. Because the continental army was composed of corps or battalions of infantry, artillery, and cavalry, therefore, captains of distinct corps which together formed a main army, under a commander-in-chief.

Second. Because, the pay fixed by the continental Congress, the settlement made for commutation pay at the end of the war, pensions granted under the several acts and by special act of Congress, established the fact, that the officers of the corps of engineers, artillery, and cavalry, is *not limited to the pay of infantry*, but settled, allowed, and pensioned at the rates established by the resolve of May 27, 1778, which "established the pay and corps of the American army."

A question of doubt was entertained after the passage of the resolve of October 21, 1780, whether surgeons were embraced; to remove all apprehension, Congress, on the 17th January, 1781, further resolved, extending half-pay of captains to surgeons, and the commutation was computed at the rate of an infantry captain.

James Thacher was a regimental surgeon attached to the corps of infantry, and by reference to the resolve of May 27, 1778, it will be perceived that the pay of a captain of infantry was $40 a month. That a surgeon of infantry was $60 a months, till in the administration of the act of 1828, a surgeon who received sixty or seventy-five dollars per month, was limited to the stipend of an infantry captain.

Not so in the administration of the act of June 7, 1832, supplementary to the "Act for the relief of certain surviving officers who shall have served in the continental line or State troops, volunteers or militia, shall receive the amount of his full pay in the said line, according to his rank, not exceeding in any case the pay of a captain in the said line."

The execution of the act of 1832 was with the War Department. Secretary Cass laid down the rule, that pensions should be computed according to the monthly pay received by an officer in the corps to which he belonged, and if not attached to any particular corps, then according to the amount of his monthly pay, not exceeding the pay of a captain of ———.

Dr. Thacher was pensioned under the act of 1828, at $40, the pay of infantry, and was permitted to relinquish for the act of 1832, at $50,

the pay of captain of artillery, which he received to the time of his death in 1837.

But not only was Dr. Thacher pensioned as surgeon at the rate of $50 per month, under the act of 1832, but also other surgeons and officers of the line, or of the line and staff where their pay was $40 per month, and the same is extended to widows of officers whether of the continental line or State troops, volunteers, or militia.

All that is asked for in the case of Dr. Thacher is, that the same rule of practice be extended to him under the act of May 15, 1828, as he received under act May 7, 1832. The pension for five years under the same law, equal to the pay of artillery in lieu of infantry.

I do not see how the reason of the solicitor deduced from the decision found in 10 Peters, 647, Wetmore vs. The United States, has any bearing on the action of the department in executing the act of 1828.

It is allowed the decision of the Supreme Court in the case cited was in conformity to usage, because Wetmore was not attached to any particular corps of the army; the decision placed him very properly in the infantry, being the corps that composed the main body of the army.

If on the other hand he had been appointed a major of cavalry, the Treasury Department would have found no difficulty in adjusting his account as a cavalry officer.

ALEX. RAY, *Attorney in fact.*

BETSEY H. HODGE AND SUSAN T. BARTLETT, children and only heirs of JAMES THACHER, deceased, *vs.* THE UNITED STATES.

JUDGE BLACKFORD'S OPINION.

The petition states that James Thacher, the father of the claimants, having been a surgeon's mate in the army of the revolution, was appointed in November, 1778, a surgeon in the first Virginia State regiment, commanded by Colonel George Gibson; that, in 1779, he accepted the office of surgeon in the Massachusetts regiment, commanded by Colonel Henry Jackson; and that he retired from service on the first of January, 1783, having been a surgeon four years; that under the act of Congress of the 15th of May, 1828, said James' name was inscribed on the pension roll of the United States, at the rate of $480 *per annum;* and that under the act of the 7th of June, 1832, he relinquished all future benefits under said act of 1828, and availed himself of the privileges of said act of 1832; that his name was again placed on the pension roll at the rate of $600 *per annum*, from the 4th of March, 1831, and so continued until his death in 1843; that said James, under said act of 1828, was entitled to $600 *per annum*, which was the pay of a captain in the line in the artillery or cavalry, and was less than the pay of a surgeon; that being so entitled he often demanded payment, but the same was refused; that surgeons in the revolution received sixty and seventy-five dollars per month; but as under the act of 1828 they could not have more than the pay of a captain in the line, the claimants demand the difference between

$480 *per annum* and $600 *per annum* from the 3d of March, 1826, to the 4th of March, 1831, which difference amounts to $600.

This case is submitted for our decision upon the allegations of the petition, admitting them to be true.

There are three questions involved in this case.

The first is, whether Doctor Thacher, as a surgeon, was within the description of officers mentioned in said act of 1828? But I shall not stop to inquire into that question, for though it be admitted that he was such officer, still, according to my view of the case, the claimants have no cause of action.

The second question is, whether, assuming the Doctor to be within the provisions of said act of 1828, he was entitled to a larger pension than forty dollars a month, which he received under that act?

That act, so far as it relates to this question, is as follows:

"That each of the surviving officers of the army of the revolution in the continental line, who was entitled to half-pay by the resolve of October twenty-first, seventeen hundred and eighty, be authorized to receive, out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, acccording to his rank in the line, to begin on the third day of March, one thousand eight hundred and twenty-six, and to continue during his natural life: *Provided*, that under this act no officer shall be entitled to receive a larger sum than the full pay of a captain in said line."—(4 Stat. at Large, 269.)

That act (considering the Doctor within it) gave him the full pay of a captain in the continental line. The pay of a captain in the artillery or cavalry in the revolutionary army was fifty dollars a month, but in the infantry it was only forty dollars a month.—(2 Jour. Old Cong., 567–8.) Now, if in the revolutionary army there were surgeons belonging to the artillery, and other surgeons belonging to the cavalry, and others to the infantry, it would seem to be proper to say that Thacher's pay would be that of a captain in the corps to which he belonged. And the resolve of Congress of the 27th of May, 1778, shows that there were surgeons attached to battalions of infantry; others to those of artillery, and others to those of cavalry.—(2 Jour. Old Cong., 567.) As the petition does not inform us to which of these parts of the army Thacher belonged, we must consider him as having been attached to that part which would entitle him to the least pay, and that was the infantry. The reason is that proof of his belonging to the infantry would satisfy the allegation in the petition that he belonged to a regiment, and a party is not required to prove more than his pleading alleges. Considering Thacher, therefore, to have been in the infantry, it may be safely said that he was only entitled to the pay of a captain in the infantry. If, however, Thacher, as a staff officer, cannot be said to have belonged to any particular part of the army, then the statutory provision aforesaid, that he should have the pay of a captain in the continental line means, in my opinion, that his pay should be that of a captain in the infantry, because the infantry constitutes the main body of the army. This was the rule at the Treasury Department, whilst pension claims were settled there, as appears by the following letter:

"TREASURY DEPARTMENT, *October* 22, 1834.

"SIR: In answer to the inquiry contained in Mr. Edwards' letter of the 17th instant, I have the honor to inform you that, by the resolves of the old Congress, surgeons were promised 'the half-pay of a captain,' and that in the settlement made with them under those resolves, at the close of the war, their half-pay was reckoned at the half-pay of a captain of infantry, and the certificates which were issued to them under the resolves granting commutation in lieu of half-pay, were for five years' full pay as captains of infantry.

"In determining the amount to be allowed to surgeons claiming the benefits of the act of the 15th of May, 1828, the department was guided by the construction which was found to have been practically given, and they were accordingly allowed the full pay of captains of infantry.

"LEVI WOODBURY.

"Hon. LEWIS CASS."

(Mayo and Moulton, 550.)

In December, 1834, Mr. Butler, Attorney General, speaking of said acts of 1828 and 1832, says: "The general allusion to the pay of a captain in the line, when applied to the case of staff officers, must be understood as referring to captains in that corps which constitutes the main body of the military force. In our army this has heretofore been, and still is, the infantry."—(Id., 420.)

Afterwards, in 1844, (the War Department having jurisdiction,) the Commissioner of Pensions concludes an opinion on the subject as follows: "The War Department, in fixing upon some rate of compensation in settling the commutation claims of surgeons, rated them as captains of infantry. As such they were paid; and if the acts of the old Congress, which are referred to in the act of 1828, are to be considered any guide in settling claims under the law of 1828, then they cannot be paid more than what an infantry captain receives."—(Id., 549.)

In the case now before us, Thacher received from the department, under said act of 1828, the pay of a captain of infantry in the revolutionary army, which, in my opinion, is all he was entitled to.

The third question is, whether the claimants, supposing their father to have been entitled to the pension in question, but did not obtain its allowance, have a right to the money after his death.

If this question can be answered in the affirmative, it is because such right is conferred by some act of Congress. Pensions for past services like those of the claimants' father, are mere gratuities, and it is the acts alone making the gift on which the claimants must rely.

The act of May 15, 1828, under which Thacher himself claimed, is silent as to representatives. Whatever right that act gives, is given to the officer alone. The act does not even provide for the payment to any person of a pension, or the balance of a pension, remaining undrawn by the pensioner at the time of his death.—(4 Stat. L., 269.)

The next is the act of March 3, 1829. The second section of that act supplies an omission in the act of 1828, and provides for the payment of the arrears of pension, due to the pensioner at the time of his death, to the widow, or, if no widow, to the children, or, if no children, to the legal representatives.—(4 Stat. L., 350)

If the present were a claim for arrears of pension, left undrawn by a pensioner at the time of his death, and who left no widow, the act would be applicable. But this is a different case. Thacher was not a pensioner as to the money now claimed. The act of 1828, under which he claimed, was not an absolute grant of pensions. An officer within that act had a right to a certain pension, provided he satisfied the Secretary of the Treasury that his claim was valid, and obtained an adjudication by the Secretary in favor of the claim. But until such adjudication the officer was not a pensioner, and had no right to draw a pension from the treasury. Claims for pensions under general acts like that of 1828, differ entirely from claims under private acts granting pensions. When an act directs the Secretary to place a person by name on the pension list, at a specified rate, that is an absolute grant of the pension to the person named, and if he should die after such grant, leaving the pension or any part of it undrawn, the provision in the act of 1829, as to those who came after him, would apply. But as before said, the grant by the act of 1828 was conditional, and until the officer embraced by the act performed the condition, he could not be called a pensioner, nor would he leave in the treasury at his death any arrears of pension. There would be no pension there that he could have drawn himself, and of course he would leave none to be drawn by others.

The appropriation act of 1828 has this provision: "For the pensions to the revolutionary pensioners of the United States, two hundred thousand dollars."—(4 Stat. L., 312) Now, was Thacher, as to said sum of $120 a year, one of those pensioners? He was not, for the reason that he had not complied with the condition contained in the act of 1828, under which he claimed. It would not, perhaps, be strictly proper to say that the only evidence of a person's being a pensioner is the pension list; but it is safe to say that without an adjudication in his favor as aforesaid, a person is not a pensioner, nor can he, at his death, leave arrears of pension descendible under the act of 1829.—(4 Stat. L., 350.)

The next act is that of June 7, 1832. That act provides that "in case of the death of any person embraced by the provisions of this act, or of the act to which it is supplementary, (said act of 1828,) during the period intervening between the semi annual payments directed to be made by said acts, the proportionate amount of pay which shall accrue between the last preceding semi-annual payment and the death of such person, shall be paid to his widow; or, if he leave no widow, to his children."—(4 Stat. L., 529.) The semi-annual payments thus directed to be made are evidently the payments of an allowed pension; and the proportionate amount spoken of in the act, to be paid on the death of a person embraced by it, is the balance of the pension at that time due to him.

The next is the act of July 4, 1836. The second and third sections

relate to persons who had served in the revolutionary war, but they have no application to the present case. The first section only applies to persons who died between the 4th of March, 1831, and the 7th of June, 1832; and the third section makes no mention of children. (5 Stat. L., 127.)

I now come to the act of June 19, 1840, which is the act, with said act of 1828, upon which the claimants principally rely. That act of 1840 is as follows:

"That in case any male pensioner shall die leaving children, but no widow, the amount of pension due to such pensioner at the time of his death, shall be paid to the executor or administrator on the estate of such pensioner, for the sole and exclusive benefit of the children," &c.

"SECTION 2. That in case any pensioner who is a widow, shall die, leaving children, the amount of pension due at the time of her death shall be paid to the executor or administrator for the benefit of her children, as directed in the foregoing section.

"SECTION 3. That in case of the death of any pensioner, whether male or female, leaving children, the amount of pension may be paid to any one or each of them, as they may prefer, without the intervention of an administrator."—(5 Stat. at L. 385.)

This act applies exclusively to pensioners; that is, to persons who, under some act of Congress, have been allowed pensions by an adjudication of the proper department; or to whom, by name, pensions have been directly and absolutely granted by private acts of Congress. The remarks which have been made in a previous part of this opinion in relation to the act of 1829, are applicable to this part of the case. As Thacher died without having obtained in his favor an adjudication of his claim to a pension in respect to said $120 *per annum*, by the proper officer, that sum was not due to him from the treasury as a pension at the time of his death; and the claim, therefore, is not within said act of 1840.

All of the acts of Congress cited by the claimants have now been noticed, none of which appears to support their claim.

It must be observed further, with regard to said acts of 1829 and 1832, that nothing could pass under them to the claimants if their father left a widow. And we are now bound to presume that he did leave a widow, as the contrary is not alleged in the petition. So that, at all events, as to any claim under those acts, the petition shows no cause of action.

It appears that the practice of allowing these claims to children has prevailed in the department between twenty and thirty years; and an opinion of Attorney General Wirt, in 1825, in a navy pension case, is supposed to have occasioned the practice.—(2 Att. Gen., 1.) The practice has been approved by some heads of the departments, but the weight of authority is decidedly against it. In February, 1836, Attorney General Butler gave an opinion against the principle on which such claims were founded.—(3 Att. Gen., 36.) But he afterwards yielded to Mr. Wirt's opinion and the usage of the department. In March, 1839, the Secretary of the Treasury, Mr. Woodbury, wrote to the Commissioner of Pensions as follows:

"I had always supposed that the granting a pension was a personal matter, and when the claimant died the claim did not descend to his heirs or representatives, or if the certificate issued incautiously to a claimant after his death, that it was void. Any other view, I supposed, would lead thousands to apply for pensions for their fathers and grandfathers, who may have died after the law passed, and with claims to the pensions, but who never perfected their title and obtained the certificate while living. If the certificate issued while the claimant was living, then, of course, I suppose the heirs could receive any arrearages, and only then. If there has been an opinion of the Attorney General the other way, or any express legislation, then, of course, no doubt could be sustained in the case; but otherwise, I would thank you to lay this letter before the Secretary of War."—(Mayo and Moulton, 538.)

In March, 1850, Mr. Ewing, the Secretary of the Interior, wrote to the Commissioner of Pensions as follows:

"SIR: I herewith return the papers in the case of Mrs. Elizabeth Thom, widow of Nathaniel Thom, deceased, and I am of the opinion that the act of June 19, 1840, in its terms applies to *pensioners*, which means persons receiving pensions, not those who can make out a case entitling them to receive pensions, but who have not done it. They are not *pensioners*, though they may become so. This act regards the actual pensioner only, and provides for the payment of so much of his pension as may have accrued and remained unpaid at the time of his death." * * * * (Mayo and Moulton, 567.)

In August, 1850, Mr. Crittenden, Attorney General, gave the following opinion:

"It appears that Dr. John Knight was a pensioner for revolutionary services under the act of the 15th of May, 1828; that his pension was paid up to the 12th of March, 1838, when he died; that his widow, Polly Knight, under the act of July 7, 1838, applied for and obtained a pension in April, 1839, commencing at the time of his death, according to the practice of the Pension Office as it existed at the time; that pension was fully paid up to the time of her death, which happened before the passage of the resolution of the 16th of August, 1842, and before the expiration of the five years for which it was granted, computing from the death of her husband on the 12th of March, 1838. * * * * * * * * *

"Had Mrs. Knight been entitled to a pension, to commence from the 4th of March, 1836, yet having during her life acquiesced in the decision of the proper officer, giving it a different commencement, her representatives have no right, as it seems to me, to contest that matter after her death. The pension was intended as a personal bounty to her, and not as a gratuity to her representatives. All that passed to them on her death was a right to have the money which had accrued under her pension as it had been actually allowed, and which remained unpaid at the time of her death."—(5 Att. Gen., 248.)

In February, June, and November, 1856, Attorney General Cushing gave opinions, saying that the law properly construed was against such claims as the one before us, but that on account of the long prac-

tice of the department in favor of them, he did not advise a departure from it.—(7 Att. Gen., 619, 717, and 8 id., 198.)

In September, 1857, the present Attorney General, Mr. Black, gave an opinion that the practice of the Pension Office allowing such claims was not supported by any law, and his opinion has not only been approved by the present Secretary of the Interior, but the practice has been discontinued by the Secretary.—(Vol. 2, part 1, 1st sess. 35th Con., p. 66.) The claimants rely on a late decision of the Supreme Court of the United States, in the case of Walton et al. *vs.* Cotton et al., 10 Howard, 355. But the question as to the legality of these claims was not raised in that case by the counsel, nor was it noticed or decided by the court.

It is the opinion of the Court that the facts set forth in the petition do not furnish any ground for relief. An order for testimony is not granted.

IN THE COURT OF CLAIMS.

REPRESENTATIVES OF JAMES THACHER *vs.* THE UNITED STATES.

LORING, Justice.

James Thacher was a regimental surgeon in the army in the war of the revolution, and survived the war. Under the act of 15th May, 1828, (4 Stat. at Large, 269,) he received $480 per year, from the 3d March, 1826, to the 4th of March, 1831, a period of five years.

The petitioners allege that the said James Thacher was entitled to and demanded under said act the sum of $600 per year, so that a balance of $120 was left unpaid to him in each year of said period, and they now claim the amount of said balances.

I am of opinion that the said James Thacher was not within the provisions of the said act of 15th May, 1828, and that his representatives can claim nothing by force of it.

The first section of the act of 15th of May, 1828, is as follows:

"*Be it enacted, &c.*, That each of the surviving officers of the army of the revolution in the continental line who was entitled to half-pay by the resolve of October 21, 1780, be authorized to receive out of any money in the treasury not otherwise appropriated, the amount of his full pay in said line, according to his rank in the line, to begin on the 3d of March, 1826, and to continue during his natural life: *Provided*, That under this act no officer shall be entitled to receive a larger sum than the full pay of a captain in said line."

The words of the section are unambiguous, and they expressly confine recipients under it to those who were entitled to "half-pay by the resolution of October 21, 1780," so that the question is brought to this, whether surgeons of regiments were entitled to half-pay under the resolve of October 21, 1780.

On the part of the petitioners it is claimed, that in the resolution of October 21, 1780, giving half-pay for life, the word "officers" includes

medical officers, and therefore surgeons. On the part of the United States it is claimed that the word "officers" in that resolve denotes only officers of the line of the army.

The resolve of October 21, 1780, had for its general object the arrangement of the line of the army. It first constitutes regiments, by declaring of what they shall consist, thus: "*Resolved*, That the several regiments of infantry requested from the respective States by a resolution of the 3d instant, be augmented, and consist of one colonel, one major, where the full colonels are continued, or one lieutenant colonel commandant, and two majors where full colonels are not continued; nine captains, twenty-two subalterns, one surgeon, one surgeon's mate, one sergeant major, one quartermaster sergeant, forty-five sergeants, one drum major, one fife major, ten drums, ten fifes, six hundred and twelve rank and file."

It then arranges the officers of companies; then provides for the augmentation of the regiments of artillery; then for four legionary corps, instead of four regiments of cavalry; then for two partisan corps; then for the enlistment of the whole of the troops for the period "of the war," and for the time they shall join their respective corps; then for officering the regiments of the southern department of the army; and then in immediate sequence of such arrangement of the line of the army, it provides as follows:

"That *the officers* who shall continue in the service to the end of the war, shall also be entitled to half-pay during life, from the time of their reduction."

The argument for the petitioners is, that the word "officers" in the clause last cited, and giving half-pay, includes surgeons, because surgeons are specified in the first clause of the resolution. But it is to be recollected that that specification is made only in the enumeration of the constituent parts of a regiment, and was as necessary for that purpose as the specification of fifes and drums.

And that the word "officers" in the clause giving half-pay was not used in reference to the enumeration in the first clause, declaring the constituent parts of a regiment, is shown by the fact, that although general officers are not mentioned in that first enumerating clause, they were yet included in the clause giving half-pay.

For, on the 28th November, 1780, (3 J. C., 551,) Congress thus resolved: "Some doubts having arisen in the minds of the general officers whether the resolution of the 21st October last, granting half-pay for life to the officers who shall remain in service to the end of the war was meant to extend to them,

"*Resolved*, That the said half-pay for life be extended to all major generals and brigadier generals who shall continue in service to the end of the war; that the resolution of the 21st October was so meant and intended."

This shows that it was not intended that the enumeration in the first clause of the resolution should construe the word "*officers*" in the clause giving half-pay, and thus excludes the petitioners' argument. And I think, as it was contended at the bar, that the resolution of October 21 is to be construed in connexion with other resolves with which it forms one legislative transaction, in fact, and in the history of the times.

This resolve of October 21, 1780, was one of a series of resolves passed by Congress in that year for the reduction and organization of the army; and in making that reorganization, Congress arranged the several departments of the army separately, and each department in a distinct resolve. Thus, by the resolve of the 15th July, 1780, it arranged the quartermaster's department; by the resolve of the 30th September, the medical and hospital department; by the resolve of the 3d October, the regiments or line of the army; and by the resolve of the 30th November, the commissary department. It would seem that in such a separate arrangement of the departments, each in a distinct resolve, the word officers in either of the resolves would refer to and denote "*officers*" in that particular department to which the resolve related: that is, that in the resolve arranging the medical and hospital department the word "officers" would mean medical and hospital officers, and in the resolve arranging the line of the army the word "officers" would mean officers in the line of the army.

Then, in this series of resolutions, the only provision for half pay is that of half-pay for seven years, and that is given only in the resolution of October 3, arranging the line of the army, and it is omitted in the other resolutions of the series arranging the other departments of the army. The inference would be, that half-pay was provided only for officers in that department arranged by the resolution of October 3, and was not provided for officers of those departments arranged by the other resolves; and this would be the inference, because the letter of the resolutions, taken altogether, would so read.

But the resolutions of October 3 and 21 were both for arranging the line of the army, and the latter was only, as its history shows, an amendment of the former, substituting a provision of half-pay for life for the provision of half-pay for seven years; and in such case the inference is that the substituted provision is to belong to the same class of officers as the original provision, and that therefore the purpose of the amendment was to enlarge the half-pay of that class of officers, and not to extend half-pay to other classes of officers, for whom no half-pay was provided in arranging the departments to which they belonged.

The history of the resolution of October 21, 1780, showing that it was in amendment of the resolution of October 3, is contained in the journals of Congress, by which it appears that the resolution of October 3 (and as far as appears no other of the series) was sent to General Washington by Congress requesting "*his opinion thereon.*" General Washington, in his reply, (dated October 11,) earnestly urged half-pay for life, and then said: "If the objection drawn from the principle of this measure being incompatible with the genius of our government, is thought insurmountable, I would propose a substitute, less eligible in my opinion, but which may answer the purpose. It is to make *the present half-pay for seven years* whole pay for the same period." The journals of Congress show that on the 21st October, 1780, Congress resumed the consideration of the report of the committee on General Washington's letter of the 11th, and carried out his recommendation of full pay for life by the resolution we are construing. It would seem clear that "*the present half-pay for life for seven years,*" referred

to by General Washington, was the half-pay specified in the resolve of October 3, arranging the line of the army, on which, and on which only, his opinion had been asked, and which he was then returning, with his comment on it, to Congress; and that it was instead of that half-pay for seven years, that Congress adopted the half-pay for life.

If the resolves of October 3 and 21 referred only to officers of the line, and provided half-pay only for them, then as the officers of the quartermaster's department and the commissary department were taken from the line and were thus within those resolutions, there was a wide difference in the matter of half-pay between the officers of the hospital and medical department and all other officers. While the half-pay was only for seven years after the war, there was some reason for this difference, because officers of the line were withdrawn by their military life from their civil avocations, and from practice and position in them, and to return to them and regain position in them at the end of the war would require some time, in which they would need means of support, and this, and no more, the half-pay for seven years would supply. But medical officers were not withdrawn from the practice of their civil professions by their duties in the army, but by these their experience and practice in their profession would be generally largely extended, and they would return to civil life better instructed and skilled than when they left it. And this may have been the reason for not extending the half-pay for seven years to them originally. But this reason would not account for the discrimination between medical officers and all others, when the resolve of October 21, 1780, changed the half-pay for seven years into half-pay for life, for such half-pay was not a temporary supply, but a permanent benefit, earned by service during the war, and the title to this belonged to medical officers as well as officers of the line. Thus, by the resolution of October 21, 1780, the difference between the medical officers and others as to half-pay became extended in degree and no longer justifiable by its former reason, and they complained of this difference, and Congress immediately passed the resolution of January 17, 1781, which, in its preamble, seems to me to declare that medical officers were not within the resolution of October 21, 1780, because it admits that the difference referred to exists; that it was not justifiable, and then proceeds to enact *a remedy* therefor.

It is observable that previous to the resolution of January 17, 1781, the only express provision for surgeons was by the resolution of September 30, 1780, for arranging the hospital department, already referred to, and that resolution gave them bounty lands and no more.

The resolution of January 17, 1781, in its preamble and enacting clause, is as follows: "Whereas by the plan for conducting the hospital department, passed in Congress the 30th day of September last, no proper establishment is provided for the officers of the medical staff after their dismission from public service, which, considering the custom of other nations and the late provision for the officers of the army after the conclusion of the war, they appear to have a just claim to: for remedy whereof, and also for amending several parts of the above mentioned plan,"

"*Resolved*, That all officers in the hospital department and medical

staff hereafter mentioned, who shall continue in service to the end of the war, or be reduced before that time as supernumeraries, shall be entitled to and shall receive during his life, in lieu of half-pay, the following allowance, viz."

The resolution then proceeds to make the allowances to the several officers it mentions, and among them specifies surgeons of regiments, and gives to them an allowance "equal to the half-pay of a captain." This was not equal to half their own pay, and therefore to them was not half-pay, but "*in lieu of half-pay*," as the resolution describes it.

Now, the purpose of this resolve, as declared by the preamble, is to give officers of the medical staff "a proper establishment" "after their dismissal from the public service," which it says "they appear to have a just *claim to.*" Could such language have been used, if such establishment had been already secured to them by the resolve of October 21, 1780, and in the fullest measure given to any?

Then the preamble contrasts the condition of medical officers with that of the officers of the army expressly in the point "*of the late provision*" made for the latter. Could this have been done if medical officers and officers of the army were equally included in that "*late provision?*"

The whole tenor of the preamble shows the purpose of improving the condition of the medical officers. For after referring to that condition, it says, "*for remedy whereof.*" But the resolve of January 17, 1781, made the condition of surgeons worse than it was before, if they were included in the resolve of October 21, 1780; for under this latter resolve they would have been entitled to half their own pay, while the resolve of January 17, 1781, gave them much less, viz: only half a captain's pay.

The purpose of a preamble to a statute is to guide the construction of its enacting clause. The construction contended for by the petitioner makes the enacting clause reverse the general purpose declared by the preamble, and presents Congress as proclaiming a benefit to meritorious officers while it intends and inflicts an injury upon them. This seems to me the inevitable result of holding that the resolve of January 17, 1781, was a mere amendment of the resolve of October 21, 1780, and that this latter resolve included medical officers. Whereas the preamble and enacting clause of the resolve January 17, 1781, and the professions and acts of Congress are brought into harmony, not only with each other, but with the history of the times and of the transaction, if that resolve was enacted for the reason, that medical officers were not included in the resolve of October 21, 1780.

The history of the resolve of January 17, 1781, is shown in the Journals of Congress, (3 vol., p. 569,) which state thus, (January 17, 1781:) "Congress took into consideration the report of the committee on the letter of the 5th of November from General Washington," &c., &c. That letter was sent to Congress by General Washington with a memorial addressed to him by the officers of the hospital department, in which they complain that "the regimental officers are established on half-pay for life, while we are left without that provi-

sion;" and they claim such provision. General Washington, in his letter of November 5th, transmitting this memorial to Congress, asks to know "how far the resolves of the 3d and 21st ultimo are to be construed in favor of the regimental surgeons who are to be reduced, the ascertaining of which previous to the arrangement is become interesting to them, and the subject of a variety of applications to me." The letter of General Washington then proceeds to urge the claims of the memorialists, but advises that they should not be considered as entitled to half their own pay, but to an allowance of some less sum; and it adduces the example of the British service, and says "that in that the surgeons of the hospital and regimental surgeons are upon reduction, entitled to half-pay;" and he adds, "what the pay of the hospital surgeons in the British service is, I am not quite certain, but I believe it is equal to that of the captains."

Thus General Washington declares his own doubts whether regimental surgeons were included in the resolve of October 21, 1780, and asks the instruction of Congress on that point, and Congress making the declarations in the preamble of the resolve of January 17, 1781, already commented on, frames that resolve in conformity to General Washington's suggestions and gives surgeons the half-pay of captains only.

The preamble of the resolve of January 17, 1781, is the answer of Congress to the inquiry of Gen. Washington, whether regimental surgeons were included in the resolve of October 21, 1780, and it is a legislative construction of that resolve, made by its framers, within three months of its passage; and I think its declarations are in substance, that no provision in the nature of half-pay after the war, had yet been made for medical officers, that they had *a just claim to* such provision, as was shown by the usages of other services, and by *the late provision* by the resolve of October 21, 1780, for officers of the line of the army; and that to fulfil this just claim of the medical officers, and to remove the unjustifiable difference between them and other officers, (*in remedy whereof*) the resolve of 17 January, 1781, was passed. If this is so, surgeons were not within the resolve of October 21, 1780; and, therefore, were not within the act of May 15, 1828.

It is to be recollected that the question on the statute of 15th May, 1828, is not whether Congress intended to give or withhold from surgeons the full pay given to officers of the line; but whether Congress intended to give such full pay to surgeons by that particular act. The words of the statute refer exclusively to the resolution of October 21, 1780, and can be extended to no other by construction.

The petition alleges that Dr. Thacher received $450 per year under the act of May 15, 1828, and thus exhibits the opinion of the department that he was within the provisions of the act. For that opinion I have great respect, but I am not authorized to defer to it in the construction of a statute.

I am of opinion that evidence should not be ordered to be taken in this case.

IN THE COURT OF CLAIMS.

JAMES THACHER'S HEIRS *vs.* THE UNITED STATES.

SCARBURGH, J., dissented.

James Thacher was appointed a surgeon's mate in the army of the revolution as early as July, A. D. 1775, and was stationed at the hospital in Cambridge.

In March, A. D. 1776, he was appointed surgeon's mate to the regiment commanded by Colonel Asa Whitcomb.

In November, A. D. 1778, he was appointed surgeon of the first Virginia State regiment, commanded by Colonel George Gibson.

In 1779 he accepted the office of surgeon to the Massachusetts regiment, commanded by Colonel Henry Jackson, and retired from service on the 1st day of January, A. D. 1783.

He was in service seven years and six months, four years of which he was surgeon.

Under the act of Congress, approved May 15, A. D. 1828, (4 Stat. at L., p. 269, ch. 43,) the name of James Thacher was inscribed on the pension rolls of the United States at the rate of $480 *per annum*.

Under the act of Congress, approved June 7, A. D. 1832, (4 Stat. at L., p. 529, ch. 126,) James Thacher relinquished all future benefits under the act of 1828, and availed himself of the privileges of the act of 1832, according to its provisions; and his name was again placed on the pension roll of the United States, at the rate of $600 *per annum*, from the 4th of March, A. D. 1831, and so continued till his death, in the year 1843.

The petitioners claim that, under the act of May 15, A. D. 1828, James Thacher was entitled to $600 *per annum*, that being the pay of a captain in the line, in the artillery, or cavalry, and less than the pay of a surgeon; and, being so entitled, he often demanded pay thereof, but it was refused by the executive department of the government charged with the pay of pensions. Payment of it has also been refused since his death.

The petitioners claim six hundred dollars for the balance of pension due their ancestor at the time of his death.

The first question which we are called upon to consider in this case is, were surgeons included by the act of 1828? In considering this question, we must necessarily inquire whether surgeons were embraced by the resolution of October 21, A. D. 1780; and in doing this, it is supposed to be necessary to determine, (1) whether surgeons were *officers commissioned* by Congress; and (2) whether they were *military officers*.

As the main question now to be settled is, whether the taking of testimony shall be ordered in this case, I shall for the present assume that surgeons were officers commissioned by Congress, and that there is a sufficient averment to that effect in the petition. The averment ought, perhaps, if material, to be expressly made in the petition; but that question does not now arise, and under our practice an amendment for that purpose would be allowed if desired. I proceed there-

fore at once to the consideration of the second point, whether regimental surgeons in the army of the revolution were *military* officers.

The word "military" in the resolution of May 15, A. D. 1778, is used in contradistinction to "civil" and "naval," and the phrase "military officers" is equivalent to "officers of the army." That resolution therefore is to be understood in the same sense as if it read "all officers of the army commissioned by Congress," instead of "all military officers commissioned by Congress." It is clear, from the whole correspondence of General Washington upon this subject, that the plan contemplated by him embraced at least all the commissioned officers of the army. I do not now say that it did or did not go further, for that is a point not involved in this case, and I have not considered it. It is equally clear, from the subsequent action of Congress, that the phrase "military officers" in that resolution was understood by them to be equivalent to the phrase "officers of the army." Moreover, the word "military" is not a technical term, and ordinarily embraces whatever pertains to the army and militia.

It cannot be justly deduced from any letter of General Washington, or from his whole correspondence taken together, that he designed to exclude any class of officers in the army from the provision of half-pay, which he so frequently and so urgently pressed upon Congress. It is certain that he nowhere expressly so declares. On the contrary, that his plan embraced at least all the commissioned officers of the army, is obvious from several considerations. (*a*) The language used by him naturally had this meaning. (*b*) No good reason has been or can be assigned why any should be excluded. (*c*) The reasons urged by General Washington in favor of his plan were applicable alike to all classes of officers. (*d*) The exclusion of any class would have defeated, as to that class at least, the great object of the plan, by causing the immediate resignation of the officers belonging to it, and their consequent loss to the army. (*e*) The very memorial from the officers of the hospital department, a copy of which is on file in this case, shows very clearly the state of feeling amongst the officers on this point. (*f*) General Washington had watched this feeling with too much care to have been deceived or in any way mistaken in regard to it. (*g*) He was fully aware of the danger of offending it, and with untiring energy guarded against every measure which could be justly charged with having such a tendency.

That Congress, in the resolution of May 15, A. D. 1778, used the phrase "military officers" as equivalent to the phrase "officers of the army," is demonstrated by the language of the resolution of August 24, A. D. 1780, extending the resolution of May 15, A. D. 1778, to the widows and orphans of those officers. That language is, "that the resolution of the 15th day of May, 1778, granting half-pay for seven years to the *officers of the army*," &c. It conclusively shows that Congress used "officers of the army" and "military officers," as convertible phrases.

The common law writers speak of the *military* state of England. Sir Wm. Blackstone says: "The military state includes the whole of the soldiery, or such persons as are peculiarly appointed amongst the rest of the people, for the safeguard and defence of the realm."—(1

Blk. Com., 408.) James, in his Military Dictionary, thus defines "military:" "Something belonging to the soldiery or militia, &c." The ordinary lexicographers define the adjective "military," as follows: "1. Pertaining to soldiers; 2. Engaged in the service of soldiers or arms, as, a military man," &c.; and the noun "militay:" "The whole body of soldiers; soldiery; militia; an army."

If regimental surgeons, then, were officers commissioned by Congress, they were officers of their respective regiments, and if regimental officers, they were officers of the army or military officers.

It is certain that Congress so considered them. On the 18th day of August, A. D. 1779, Congress proceeded to the consideration of the report for a further allowance to the *officers of the army*, when a motion to take up "the clause in the report for extending the half-pay to continue during life" was negatived. Immediately afterwards, the following resolution was adopted: "That until the further order of Congress, *the said officers* be entitled to receive monthly for their subsistence money, the sums following, to wit: each colonel and brigade chaplain, $500; each lieutenant colonel, $400; every major and regimental surgeon, $300; every captain, $200; every lieutenant, ensign, and surgeon's mate, $100." This resolution contemplates a surgeon not only as an officer of the army—*one of said officers*—but moreover as one of the officers for whom provision had been made by the resolution of May 15, A. D. 1778; for the matter in relation to the said officers just disposed of and thereby referred to, was a proposition to extend the half-pay provided by that resolution "to continue during life." Even in the resolution of October 21, A. D. 1780, which was framed in accordance with the recommendation of General Washington, a surgeon is expressly named as one of the regimental officers.

It seems to me, therefore, to be clear that regimental surgeons in the army of the revolution were military officers, and being as I have for the present assumed, commissioned by Congress, they were within the resolution of May 15, A. D. 1778.

The resolutions of October 3 and October 21, A. D. 1780, were probably, in their scope, neither larger nor more restricted than the resolution of May 15, A. D. 1778. The resolution of October 3 never went into operation. It was submitted to the commander in-chief, and afterwards amended, in pursuance of his suggestions, by the resolution of October 21. The last resolution provided half-pay for life for all officers who should be reduced by the reorganization of the army thereby required, and then further provided, as follows: "That the officers who shall continue in the service to the end of the war shall also be entitled to half-pay during life, to commence from the time of their reduction."

The natural construction of the resolution of October 21, taking it in connection with the letter of General Washington, of October 11, A. D. 1780, which may justly be regarded as its basis, would embrace, at least, all the commissioned officers of the army. General Washington said: "It is not the intention of these remarks to discourage a reform, but to show the necessity of guarding against the ill effects by an ample provision, both for the officers who stay and for those who are reduced." This was but a reiteration of what he had

often urgently pressed upon Congress, and plainly embraced all the officers of the army; and the resolution itself, upon its very face, shows that it was designed but to embody and carry out the recommendation of General Washington. It was, I think, so understood by Congress, and is so spoken of by all the historians who have noticed it. Baron Steuben, who was then in Philadelphia, wrote as follows: "It is with the greatest satisfaction I acquaint you that the plan of arrangement for the army which your excellency sent to Congress has been agreed to without any alteration. The granting half-pay for life to the reduced officers has met with some opposition, yet the proposition has not only passed, but it was resolved immediately after to extend these advantages to *all the officers* in the service."—(6 Wash. Life and Writings, by J. Sparks, 255.)

But as only regimental officers were specially named in the resolution of October 21, A. D. 1780, doubts arose in the minds of the general officers whether it extended to them. This occasioned the explanatory resolution of November 28, A. D. 1780.

From the same cause the officers of the hospital department supposed that they were not provided for by the resolution of October 21, and, therefore, they presented to the commander-in-chief the memorial which has already been noticed. There is nothing in the letter of General Washington to Congress, based upon this memorial, from which any opinion of his as to the construction of the previous resolutions can even be inferred. But it is indisputable that the resolution of January 17, A. D. 1781, was passed upon his suggestion and in conformity to his recommendations. That resolution, upon its face, is but an amendment of previous resolutions. It nowhere declares that no provision had been made for the officers therein named. It could not have done so, for such a provision had been made, but it differed in its details from the suggestions of the commander-in-chief. The resolution merely sets forth that, "by the *plan for conducting the hospital department*, passed in Congress the 30th day of September last, no *proper* establishment is provided for the medical staff," &c. It then goes on merely to modify the previous resolution, by declaring that, *in lieu of half-pay*, the officers therein named should be entitled to the provision thereby made for them. It was, in fact, but an amendment of the resolutions of October 21 and of September 30, A. D. 1780, and in legal contemplation a part of them. They together constitute one system, and must be construed as if they had been passed at the same time.

My opinion, therefore, is, that regimental surgeons in the army of the revolution were embraced by the resolution of October 21, A. D. 1780.

But it is suggested that surgeons were not officers of the army of the revolution in the continental *line*. James, in his Military Dictionary, says that the true import of *line*, in military matters, means that solid part of an army which is called the main body, and has a regular formation from right to left. But he also says, that this term is frequently used to distinguish the regular army of Great Britain from other establishments of a less military nature. It was doubtless used in both these senses in the proceedings of the old Congress. It was

sometimes used to designate the continental army in contradistinction to the militia, or from the merely State lines. It was again used to designate the main body of the army, which had a regular formation from right to left, in contradistinction to the staff, &c. A single illustration may be sufficient on this point. On the 20th day of November, A. D. 1779, Congress adopted a resolution "that the director general, * * * *regimental surgeons*, and mates, * * * shall each be entitled annually to draw clothing from the stores of the clothier-general in the same manner and under the same regulations as are established for officers of the *line* by a resolution of Congress of the 26th day of November, 1777." On the same day, the very next succeeding resolution provided "that until the further order of Congress the following officers of the military hospital shall be entitled to subsistence in like manner as is granted to officers of the *line* by a resolution of the 18th day of August last," &c. The "resolution of the 18th day of August last," which has already been quoted, expressly provides for *regimental surgeons*.

I have cited these instances, not as illustrations of the correct use of the word "line" in its different senses, but merely to show that it was used in different senses by the old Congress. In one of those senses, a regimental surgeon was an officer of the continental *line*, and in the other, he was not an officer of the *line*. When the phrase "continental line" was used (as it generally if not universally was) to designate the continental army, then a regimental surgeon was embraced by it, because he was an officer of the continental army. But when the word *line* was used in contradistinction to staff, then the regimental surgeon was not included, because he was a staff, and not a *line* officer in that sense. The words "continental line," in the act of May 15, A. D. 1828, were used in the former sense.

But it is also suggested that the act of 1828 applies only to officers who had *rank* in the continental line, and that regimental surgeons are not within it, because they had no *rank* in the line. In the sense here referred to, no officer in the continental army was entitled to pay "according to his rank in the line." The pay was regulated according to offices, and not according to rank—*i. e.* each officer was paid according to the office he held in the army. It is true that *rank* depended on *office*, but then an older officer of any particular *grade* takes *rank* of his junior officer of the same grade, whilst both receive the same *pay*. Regimental surgeons, being officers of the army, necessarily held office, though in strictness they may not have had *rank in the line;* and they received pay according to their office—*i. e.* the pay annexed by law to their office. No more was true of any other officer in the army. Each one was entitled to the pay annexed by law to his office, and this was his pay in the line—*i. e.* his pay in the army. Regimental surgeons, therefore, were entitled to pay according to their rank in the line, precisely in the same sense in which any other officers in the army were entitled to pay according to their rank in the line.

To my mind, therefore, it is clear, that if regimental surgeons in the army of the revolution were commissioned by Congress, they were within the act of 1828.

But if a regimental surgeon was within the act of 1828, to what was he entitled under that act? To his full pay in the continental army, reduced by the *proviso* of that act. The full pay of an infantry captain in the continental army was $480 a year; and that of an artillery or cavalry captain was $600 a year. To which of these was a surgeon entitled under the act of 1828? Did the act contemplate that any captain, whether of the infantry, artillery, or cavalry should receive a larger annuity than an officer of higher rank, whose full pay in the line was greater than his? Was it the intention of the act that a colonel of infantry, or of artillery, should receive only $480 a year, and a captain of artillery $600 a year? Nothing but express words, plainly susceptible of no other meaning, can justify a construction which would lead to such a result. But regimental surgeons are provided for precisely in the same way and by the same terms as every other officer whose pay exceeded that of a captain. If, therefore, a colonel of infantry was under the act of 1828 entitled to an annuity of $600 a year, a regimental surgeon was also entitled to it. And such, it seems to me, was the clear intention of the act.

The case of Wetmore *vs.* The United States (10 Peters' R., 647,) is not analogous to this case. If the question now were, to what was a regimental surgeon entitled under the resolution of January 17, A. D. 1781, that case would have an important bearing upon it. Then it would be plain that the words of the resolution would be satisfied by giving to the surgeon the half-pay of a captain of infantry, and the principles of the case of Wetmore *vs.* The United States would seem to be entitled to a controlling influence. But in the question now before us, whilst it might be said that the words of the *proviso* would be satisfied by the pay of a captain of infantry, still such a construction would produce results in plain conflict with the spirit of the act. Moreover in the case of Wetmore *vs.* The United States, the *grant* was the pay of a major, whilst here the *grant* is the full pay of a surgeon, reduced by a *proviso* so as not to *exceed* the pay of a captain. Hence, it seems to me that the case of the United States *vs.* Dickson (15 Peters' R., 165) is directly in point. In that case the Court say: "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a *proviso* is afterwards introduced, that *proviso* is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a *proviso* carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the *words* as well as within the *reason* thereof." The effect of the application of this principle in that case was to allow a receiver of public money to retain the whole yearly *maximum* of his commissions for the fraction of the year in which he resigned. Hence, I think the *proviso* in the act of 1828 should be construed to refer to the pay of a captain of artillery, for no other pay is within both the *letter* and the *reason* of the *proviso*. A different construction, as I have shown, would give a colonel of infantry a smaller annuity than a captain of artillery, and thus violate

the spirit of the act; but this construction conforms as well to its letter as its spirit.

But the decision giving to a surgeon only $480 a year was a cotemporaneous construction of the act of 1828. By that same decision, however, all other officers whose pay exceeded that of a captain of artillery were given $600 a year; and thus the decision was inconsistent with itself. It was, moreover, as to the surgeons, founded on a wrong reason, that under the resolution of January 17, A. D. 1781, they had always been held entitled only to the half-pay of a captain of infantry; for the act of 1828 gave surgeons, not double what they were entitled to under the resolution of January 17, A. D. 1781, but their full pay in the army reduced by the *proviso* so as not to exceed that of a captain. The inconsistency of this decision with itself and the error on which it was founded were subsequently discovered, and a different construction, giving surgeons $600 a year, was adopted under the act of 1832. So that the first decision is not entitled to weight as a cotemporaneous construction of the act of 1828

Dr. Thacher then, being in his lifetime entitled to an annuity of six hundred dollars a year under the act of May 15, A. D. 1828, from March 3, A. D. 1826, to March 4, A. D. 1831, a period of five years, and having received payment therefor at the rate of only $480 a year, the question now arises whether his personal representatives are entitled to receive the balance still remaining due, to wit, $600.

Dr. Thacher was alive when the act of 1828 passed, and survived the fourth day of March, A. D. 1831. He proved in the manner prescribed by the Secretary of the Treasury, his title to the benefits of the act, but in consequence of an erroneous decision of the secretary, received only four-fifths of what he was entitled to. His title to the remaining fifth which he did not receive, was as clear as his title to the four-fifths which he did receive.

The act it seems to me gave, to each officer who served in the manner prescribed by it, a *title* to its benefits. It authorized him to receive the pay thereby provided. It required certain money to be deducted "from what said officer would otherwise be *entitled* to." It directed the *pay* to be paid "to the officer or soldier *entitled* thereto." It required the officer or soldier *entitled* to furnish evidence of his *title*. The amount which accrued from the 3d day of March, A. D. 1826, to the 3d day of March, A. D. 1828, was made payable "as soon as may be," and that which accrued afterwards was made payable semi-annually. Such a *title* it seems to me is property capable of being transferred *inter vivos*, and transmitted to representatives by death. The terms employed are appropriate to this purpose, and were, I think, so understood by Congress. Hence an express provision was inserted, declaring that it should not be transferable, or liable to legal process—qualities which it would have possessed but for this provision.

The only provision of the statute from which it might be inferred that this interest is not transmissible by death, to personal representatives, is that which declares that it shall enure wholly to the personal benefit of the officer or soldier entitled to it. But this I regard as but an emphatic mode of declaring what had before been expressed—

that it should not be transferred to a purchaser, or subjected by legal process to the payment of his debts. It was to be his own in all other respects and for all other purposes.

I feel the more confidence in this construction, because it is the cotemporaneous construction put upon the act immediately after its passage, by the Secretary of the Treasury, whose duty it was to carry it into execution, *and* that which it continued to receive till the year 1857.

Whether the second section of the act of March 2, A. D. 1829, was applicable to this case, is a question which I do not deem it material to consider.

After the act of 1828, thus construed by the Executive Department of the government, had been in operation more than four years, the act of June 7, A. D. 1832, was passed. The latter act was "supplementary" to the former, extending its benefits to a much larger class of officers and soldiers, but as regards the question now under consideration, its language was identical with that of the act of 1828. The act of 1832 thus adopted language which had already received a practical construction by that department of the government to which its execution had been committed. The legal presumption is, not only that this was known to Congress, but that in again using language the meaning of which in a previous statute had been ascertained, their intention was to use it in that sense. (Bac. Ab., 379.) I regard this as a legislative approval of the construction which had been adopted. The Secretary of the Treasury, accordingly, put the same construction on this act which he had previously put upon the act of 1828; and this construction though occasionally questioned, continued uninterruptedly to govern the practice of the Executive Department of the government under it till the year 1857, when the present Attorney General gave an opinion that it is erroneous.

My views, it seems to me, are still further strengthened by the provisions of the 2d section of the act of July 4, A. D. 1836.—(5 Stat. at L., p. 527, ch. 362.) Under the act of June 7, A. D. 1832, the pension allowed by it commenced on the 4th day of March, A. D. 1831, but no person was entitled thereto who did not survive the passage of that act. But the second section of the act of July 4, A. D., 1836, provides that if any officer, soldier, &c., who had served as required by the act of June 7, A. D. 1832, had died between the 4th day of March, A. D. 1831, and the date of the latter act, the amount of pension which would have accrued from the 4th day of March, 1831, to the time of his death if he had survived the passage of that act, should be paid to his widow; or if he left no widow, to his children. To my mind it is clear that this act was passed under the influence of the then well understood construction which had been put on the act of 1832. There was the same reason for providing for the widow and children of the officer who survived the passage of the act, but died before asserting his claim, as there was for providing for the widow and children of the officer who survived the period from which the pay commenced, but did not survive the passage of the act. The act of July 4th, A. D. 1836, would doubtless have embraced both cases, if it had not been considered that the former was already provided for

by the act of 1832. Not only was this act a *quasi* legislative construction of the act of 1832, but it shows the impropriety and injustice of adopting and acting upon a particular construction of a statute until subsequent legislation is based upon it, or influenced by it, and *afterwards* declaring it to be erroneous. The act of 1828 had received a known construction, and its words were adopted in the act of 1832 because they had already received that construction ; and the second section of the act of 1836 was passed because the act of 1832 had failed to provide for a case which came within the equity of the latter act so construed.

My opinion is that an order should be made, directing testimony to be taken in this case.